TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 102.

JOHN H. OLMSTED AND WILLIAM H. OLMSTED,
PLAINTIFFS IN ERROR,

vs.

DANIEL H. OLMSTED, ELLEN A. OLMSTED, WIFE OF DANIEL H. OLMSTED; MARY O. DECKER, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED MARCH 16, 1908.

(21,069.)

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Court of Appeals.

OF NEW YORK, *ss:*

n the Court of Appeals held at the Capitol, in the City of
ny, on the seventeenth day of January in the year of our
l, one thousand nine hundred and eight, before the Judges of
Court.

ness, The Hon. Edgar M. Cullen, Chief Judge, Presiding.
W. H. SHANKLAND, *Clerk.*

nittitur January 8th, 1908.

DANIEL H. OLMSTED, Plaintiff-Appellant,
against
N A. OLMSTED and Others, Defendants-Appellants; JOHN H.
MSTED and WILLIAM H. OLMSTED, Defendants-Respondents.

e it remembered that on the 30th day of April in the year of our
l one thousand nine hundred and seven, Daniel H. Olmsted and
n A. Olmsted and others, the appellants in this action, came
into the Court of Appeals, by Charles H. Luscomb and Read
Dilworth, their attorneys, and filed in said court notices of appeal,
return thereto from the order and judgment of the Appellate
ision of the Supreme Court in and for the First Judicial Depart-
nt.

And John H. Olmsted and William H. Olmsted, the respondents
said action, afterwards appeared in said Court of Appeals by
ers & Snyder, their attorneys, which said notices of appeal and
the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this
cause argued by Mr. Charles H. Luscomb of counsel for the
aintiff appellant and by Mr. Read G. Dilworth of counsel for
e defendants appellants, and by Mr. Mortimer W. Byers of counsel
r the defendants respondents, and after due deliberation had
hereon, did order and adjudge that the judgment of the Appellate
Division of the Supreme Court appealed from herein be and the
ame hereby is reversed and that of Trial Court affirmed, with costs
n both courts.

And it was also further ordered that the record aforesaid, and the
proceedings in this court, be remitted to the said Supreme Court,
there to be proceeded upon according to law.

Therefore it is considered that the said judgment of Appellate
Division be reversed and that of Trial Court affirmed with costs in
both courts as aforesaid.

And hereupon as well the Notice of Appeal and return thereto
aforesaid as the judgment of the Court of Appeals aforesaid, by
them given in the premises, are by the said Court of Appeals re-
mitted into the Supreme Court of the State of New York, before
the Justices thereof, according to the form of the statute is such case

made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the justices thereof &c.

R. M. BARBER,
Deputy Clerk of the Court of Appeals of the State of New York.

c COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *January 8th*, 1908.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein attached thereto.

[SEAL.] R. M. BARBER,
Deputy Clerk.

d Court of Appeals, State of New York.

DANIEL H. OLMSTED, Plaintiff-Appellant,
against
ELLEN A. OLMSTED and Others, Defendants-Appellants; JOHN H. OLMSTED and WILLIAM H. OLMSTED, Defendants-Respondent.

Case on Appeal.

Charles H. Luscomb, Attorney for Plaintiff-Appellant, 120 Broadway, New York City.

Read G. Dilworth, Attorney for Defendants-Appellants, 149 Church Street, New York City.

Byers & Snyder Attorneys for Defendants-Respondents, 41 Park Row, New York City.

1 New York Supreme Court, City and County of New York.

DANIEL H. OLMSTED, Plaintiff,
against
ELLEN A. OLMSTED, wife of Daniel H. Olmsted, MARY O. DECKER, Frank S. Olmsted, Clarence E. Olmsted and Estelle, His Wife; Frances A. Reynolds and Delos Reynolds, Her Husband; Edwin Olmsted, Frederick D. Olmsted and Ruth, His Wife; John H. Olmsted and Amelia, His Wife; William H. Olmsted and Grace, His Wife; and James H. Bird, as Executor under the Will of Silas Olmsted, Deceased, Defendants.

Statement Under Rule 41.

Oct. 3, 1905 Summons and Complaint served upon defendants Frances Reynolds, Delos Reynolds and Edwin Olmsted, who defaulted.

Oct. 4, 1905 Defendant James Bird appeared and Summons and Complaint were delivered to his attorney Seth Bird.

Oct. 11, 1905 Defendants Ellen A. Olmsted, Clarence E. Olmsted, Estelle Olmsted and Mary O. Decker appeared and Summons and Complaint were delivered to their attorney Read G. Dilworth.

Oct. 17, 1905 Defendants John H. Olmsted, Amelia Olmsted, lliam H. Olmsted and Grace Olmsted appeared and Summons l Complaint were delivered to their attorneys Byers and Snyder.

Nov. 3, 1905 answer served on behalf of defendants Ellen A. Olmsted, Clarence E. Olmsted, Estelle Olmsted and Mary Decker.

Dec. 7, 1905 Summons and Complaint served upon defendant th Olmsted, who defaulted.

Dec. 8, 1905 Summons and Complaint served upon defendant derick D. Olmsted, who defaulted.

Dec. 16, 1905 Answer served on behalf of defendants John H. nsted, Amelia Olmsted, William H. Olmsted and Grace Olmsted.

Feb. 19, 1906 Answer served on behalf of defendant James Bird.

May 7, 1906 Case submitted on agreed statement of facts to Mr. tice Greenbaum, sitting in Special Term Part III.

Aug. 2, 1906, Final Decree filed.

Aug. 21, 1906 Exceptions and Notice of Appeal filed.

There has been no change of parties or attorneys since the commencement of the action.

The names of the parties are set forth in full at the head of this ement.

Notice of Appeal.

Supreme Court State of New York.

DANIEL H. OLMSTED, Plaintiff,
against
ELLEN A. OLMSTED et al., Defendants.

SIRS: You will please take notice that the defendants John H. Olmsted and William H. Olmsted appeal to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, from the judgment entered herein August 2nd, 1906, in the office of the Clerk of the County of New rk, directing the distribution of the proceeds, rents, issues and fits of the premises sought to be partitioned herein, and this appeal aken from the whole and each and every part of said judgment, the said defendants intend to bring up for review upon said ap- their exceptions to the findings of fact and conclusions of law forth in the decision of the court filed herein on August 2nd, 6, upon which said judgment was entered, and the exceptions to refusal of the court to make certain findings of fact and con- ions of law, as requested by said defendants, which proposed ings were filed herein on August 14th, 1906.

Dated, Aug. 21, 1906.

BYERS AND SNYDER,
Attorneys for Defendants, John H. & William H. Olmsted, 11 Park Row, Manhattan, New York City, New York.

o Peter J. Dooling, Clerk of the County of New York; Charles Luscomb, Attorney for Plaintiff; Seth Bird, Attorney for Defend- Bird; Read G. Dilworth, Attorney for Ellen Olmsted, et al.

4 *Summons.*

New York Supreme Court, City and County of New York.

DANIEL H. OLMSTED, Plaintiff,
against
ELLEN A. OLMSTED, Wife of Daniel H. Olmsted; MARY O. DECKER, Frank S. Olmsted, Clarence E. Olmsted and Estelle, His Wife; Frances A. Reynolds and Delos Reynolds, Her Husband; Edwin Olmsted, Frederick D. Olmsted and Ruth, His Wife; John H. Olmsted and Amelia, His Wife; William H. Olmsted and Grace, His Wife; and James H. Bird, as Executor under the Will of Silas O-msted, Deceased, Defendants.

Trial Desired in New York County.

To the above named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, New York, September 27th, 1905.

CHARLES H. LUSCOMB,
Plaintiff's Attorney.

Office and Post Office Address, No. 120 Broadway, Borough of Manhattan, New York City.

5 *Complaint.*

New York Supreme Court, City and County of New York.

DANIEL H. OLMSTED, Plaintiff,
against
ELLEN A. OLMSTED, Wife of Daniel H. Olmsted; MARY O. DECKER, Frank S. Olmsted, Clarence E. Olmsted and Estelle, His Wife; Frances A. Reynolds and Delos Reynolds, Her Husband; Edwin Olmsted, Frederick D. Olmsted and Ruth, His Wife; John H. Olmsted and Amelia, His Wife; William H. Olmsted and Grace, His Wife; and James H. Bird, as Executor under the Will of Silas O-msted, Deceased, Defendants.

The above named plaintiff complains of the above named defendants as follows:

First. He avers that he and the defendants Mary O. Decker, Clarence E. Olmsted, Frances A. Reynolds, Edwin Olmsted and Frederick D. Olmsted are tenants in common and own the fee of the premises hereinafter described, which said premises vested in the

plaintiff and said defendants under and pursuant to codicil No. 1 to the Will of Silas Olmsted, deceased, which said will was duly admitted to probate by the Surrogate of New York County.

6 Second. That in and by the provisions of said codicil, the premises hereinafter described vested in plaintiff and said defendants, from and after the death of William F. Olmsted and Benjamin F. Olmsted, the sons of said Silas Olmstead, deceased; that the said William F. Olmsted died leaving him surviving his children Frances A. Reynolds, Edwin Olmsted and Frederick D Olmsted, defendants above named; and the said Benjamin F Olmsted died, leaving him surviving this plaintiff and defendants Mary O. Decker and Clarence E. Olmsted; that said will is dated October 2, 1860, and said codicil, the 4th day of March, 1862. That the provision in said codicil is as follows:

"From and after the death of both my sons, William F. and Benja-"min Franklin, I give and devise one equal undivided one-half part "of said house, lot and premises to the lawful issue of each of my said "sons, such issue to take share and share alike; the children of any "deceased child of either of my said sons to take the share their "parent would have taken if living."

That none of the parties hereto are infants. That one of the children of Benjamin F. Olmsted, named Frank S. Olmsted, left the City and State of New York and disappeared, in the year 1874; that the said Frank S. Olmsted was heard of a short time thereafter in Chicago, Ill.; that plaintiff has been unable to locate the said Frank S. Olmsted since, although he has made diligent investigation and inquiry, and believes him to be dead.

Third. That the said Benjamin F. Olmsted, deceased, father of this plaintiff and the defendants Mary O. Decker and Clarence E. Olmsted, was married to the plaintiff's mother in the year 1850, and that while said marriage was in full force, the said Benjamin F. Olmsted performed an alleged marriage ceremony with one Sarah L. Welchman, to wit, on February 28, 1874; that thereafter said

7 Benjamin F. Olmsted, without notice to his wife, the mother of this plaintiff, secured a divorce from plaintiff's mother in the State of Michigan; that plaintiff's said mother maintained an action in the Supreme Court of the State of New York against said Benjamin F. Olmsted for a limited divorce upon the ground of desertion; and that the said Benjamin F. Olmsted defended such action by setting up the Michigan divorce; that the issues in said action came on for trial before Mr. Justice Barrett, in the Supreme Court in the County of New York, and the said mother of this plaintiff was granted a decree of limited divorce, or separation; that thereafter an appeal was taken to the then General Term of the Supreme Court and said judgment was duly affirmed, the validity of said Michigan divorce having been passed upon and denied by both the Special and Appellate Terms, in this action. That said judgment was entered in January, 1885, affirmed October 1885.

Fourth. Upon information and belief, that the said Benjamin F. Olmsted lived with the said Sarah L. Welchman and had by her

two (2) children, John H. Olmsted and William H. Olmsted, which said children claim to have some interest in the property hereinafter described, (although they are not the lawful issue of said Benjamin F. Olmsted); and said John H. and William H. Olmsted are made parties to this action for the purpose of determining or foreclosing any right or interest which they may claim.

Fifth. That the said Sarah L. Welchman died January 30, 1900; (plaintiff's mother and the lawful wife of said Benjamin F. Olmsted, died on January 22, 1902); and the said Benjamin F. Olmsted died July 16, 1905.

Sixth. That in and by the will of said Silas Olmsted and the codicil thereto above mentioned, a following provision directs the executor of said Silas Olmsted, from and after the death of his sons

Benjamin F. and William F. Olmsted to sell the property
8 hereafter described, and after paying expenses of sale and conveyances, to pay over the net proceeds of the sale to the

parties entitled thereto, as provided, but that the said executor, one James H. Bird, has not sold said premises and is made a party to this action for the purpose of ascertaining and construing his rights, powers and duties in the premises, and for the further purpose of reaching the proceeds of the sale, should he lawfully sell the same pending this action.

Seventh. Plaintiff alleges that said property consists of a three story house, known as #500 Washington street, in the City of New York, and that the same cannot be actually partitioned, being so situated that a partition thereof cannot be made without great prejudice to the owners; that said premises are now rented, and as plaintiff is informed and believes, the said James H. Bird has collected and still continues to collect the rents therefrom.

Eighth. That the defendant Mary O. Decker is a widow, and that the other defendants Ellen A. Olmsted, the wife of plaintiff; Estelle Olmsted, wife of Clarence E. Olmsted; Delos Reynolds, the husband of Frances A. Reynolds; Ruth Olmsted, wife of defendant Frederick D. Olmsted, have or claim to have some interest in the premises as dower or curtesy and Amelia Olmsted the wife of John H. Olmsted; and Grace Olmsted the wife of William H. Olmsted, are made defendants herein for the same reason that the said John H. and William H. Olmsted are named as defendants, as above set forth.

Ninth. That the said property, hereinbefore referred to, is bounded and described as follows:

All that certain lot, piece or parcel of land, situate, lying and being in the Eighth Ward of the City of New York, on the westerly side of Washington street, commencing at a point sixty (60) feet northerly from the intersection of Washington and Spring streets,

running thence northerly along the westerly side of Wash-
9 ington street, twenty (20) feet; thence westerly, parallel with Spring street, sixty (60) feet; thence southerly, parallel with Washington street, twenty (20) feet; thence easterly, parallel with Spring street, sixty (60) feet to the point or place of beginning; being the same premises described on the Tax Map of the City of New

k, as lot No. 49, Block No. 595, in the Eighth Ward; and also
ribed as lot No. 9 in a deed dated August, 1845, Murray Hoff-
to Silas Olmsted, recorded in the Register's office, in the County
ew York, in Liber 465 of Conveyances at page 371.
pon information, the said premises are not mortgaged or other-
encumbered.
Therefore, plaintiff demands judgment that the said property be
and the proceeds thereof apportioned among the parties en-
l thereto; and that if in the meantime the said defendant James
Bird, shall have lawfully sold the said premises under the power
le in said will of said Silas Olmsted, deceased, contained, that
determination of the rights of the several parties herein be made
pply to the partition of the money received from such sale; and
the rights of all the parties hereto in and to said property or the
eeds thereof; be ascertained and determined; and that the
ntiff have the costs and disbursements of this action.

CHARLES H. LUSCOMB,
Attorney for Plaintiff, 120 Broadway,
Borough of Manhattan, New York City.

CITY AND COUNTY OF NEW YORK, ss:

aniel H. Olmsted, being duly sworn, says that he is the plaintiff
he above entitled action; that he has read the foregoing com-
nt and knows the contents thereof; that the same is true to his
knowledge, except as to the matters therein stated to be alleged
information and belief; and that as to those matters he be-
s it to be true.

DANIEL H. OLMSTED.

worn to before me this 27th day of September, 1905.

HENRY E. GAUDY,
Notary Public, New York County.

Answer of John H. Olmsted et al.

New York Supreme Court, City and County of New York.

DANIEL H. OLMSTED, Plaintiff,
against
EN A. OLMSTED, Wife of Daniel H. Olmsted; MARY O. DECKER,
rank S. Olmsted, Clarence E. Olmsted, and Estelle, His Wife;
rances A. Reynolds, and Delos Reynolds, Her Husband; Edwin
lmsted, Frederick D. Olmsted and Ruth His Wife, John H.
lmsted and Amelia, His Wife; William H. Olmsted and Grace,
is Wife; and James H. Bird, as Executor under the Will of
las Olmsted, Deceased.

he defendants, John H. Olmsted, and Amelia, his wife, and
iam H. Olmsted and Grace his wife answering the complaint
in allege:

For a First Defense.

I. They admit the truth of the allegations contained in the "Seventh" and "Ninth" paragraphs of the complaint.

II. They deny the allegations contained in the "First" paragraph of the complaint.

III. They deny so much of the "Second" paragraph of the complaint as states that "that in and by the provisions of said
12 Codicil, the premises hereinafter described vested in plaintiff, and said defendants, from and after the death of William F. Olmsted and Benjamin F. Olmsted, the sons of said Silas Olmsted, deceased."

That as to the remaining portion of said paragraph, they deny knowledge or information sufficient to form a belief, except that they admit that Silas Olmsted, died leaving a Will and Codicil and that the extract of said Codicil set forth in said paragraph is correct.

IV. They deny knowledge or information sufficient to form a belief as to that portion of the "Third" paragraph of the complaint which states, "That said Benjamin F. Olmsted, deceased, father of this plaintiff and the defendants Mary O. Decker, and Clarence E. Olmsted, was married to the plaintiff's mother in the year 1850, and that while said marriage was in full force, the said Benjamin F. Olmsted performed an alleged marriage ceremony with one Sarah L. Welchman, to wit, on February 28, 1871," and they deny the allegations contained in the remaining portion of the said "Third" paragraph of the complaint.

V. They deny that portion of the "Fourth" paragraph of the complaint, which states, "although they are not the lawful issue of said Benjamin L. Olmsted."

VI. They admit that the mother of John H. Olmsted and William H. Olmsted died on or about January 30, 1900, and they admit that Benjamin F. Olmsted died on or about July 16th, 1905, and they deny knowledge or information sufficient to form a belief, as to the remaining allegation in the "Fifth" paragraph of the complaint contained.

VII. They deny knowledge or information sufficient to form a belief as to the allegations contained in the "Sixth" and "Eighth" paragraphs of the complaint.

13 *For a Second and Separate Defense.*

VIII. These defendants realleging and repeating all and every the admissions, denials and allegations, hereinbefore contained, for a further and separate defense, allege, that heretofore and in about the year 1850, the said Benjamin F. Olmsted was duly married to the said Mary Jane Olmsted; that they continued to live and cohabit together as man and wife, until sometime during the year 1870, when the said Mary Jane Olmsted voluntarily and without cause, separated from the said Benjamin F. Olmsted her husband, and refused to live with him; that shortly thereafter the said Benja-

min F. Olmsted gave up his domicile in the State of New York, and sojourned temporarily in the State of New Jersey, and later in the Dominion of Canada, and finally in about the year 1880, went to the State of Michigan for the purpose of actually and in good faith acquiring a permanent domicile there, and he did take up his permanent domicile there actually and in good faith.

IX. That thereafter and on or about the 9th day of February, 1882, the said Benjamin F. Olmsted then being a resident of the State of Michigan and having had his permanent domicile there for two years or thereabouts, as aforesaid, instituted a cause or proceeding in the Circuit Court of the State of Michigan for the County of Wayne, which was a court of record having general jurisdiction, against the said Mary Jane Olmsted to dissolve the marriage then subsisting; that the said court had jurisdiction of said cause or proceeding, of the subject-matter thereof and also had jurisdiction of the matrimonial status of the parties thereto, that one of the grounds alleged by the said Benjamin F. Olmsted in his bill of complaint in the said action, was the said desertion by the said Mary Jane Olmsted above set forth.

14 That thereafter such proceedings were duly had therein, according to the Laws and Practice of the State of Michigan; that on or about the 19th day of June, 1882, a final decree of divorce was duly given or made, absolutely dissolving the marriage theretofore existing between the said Benjamin F. Olmsted and the said Mary Jane Olmsted.

X. That the said final decree of divorce was valid and binding upon the said Mary Jane Olmsted; that the said bonds of matrimony theretofore existing between her and the said Benjamin F. Olmsted were then absolutely dissolved; that such decree of divorce ever since said 19th day of June, 1882, has remained unreversed and so has continued to be in full force and effect; that the said final decree of divorce or judgment was and is legal under, and in all respects in accordance with the Laws of the State of Michigan.

XI. That about four years after the said Mary Jane Olmsted had deserted the said Benjamin F. Olmsted as aforesaid, and refused to live and co-habit with him, the said Benjamin F. Olmsted, and one Sarah Louise Welchman, lived and co-habited together as man and wife and the said Sarah Louise Welchman assumed the name of the said Benjamin F. Olmsted. That sometime prior to the time when the said Benjamin F. Olmsted became a resident of the State of Michigan, and had his permanent domicile there as aforesaid two sons were born to the said Benjamin F. Olmsted, of whom the said Sarah Louise Welchman was the mother, which sons were the said John H. Olmsted and William H. Olmsted, the defendants above named.

That when the said Benjamin F. Olmsted became a resident of and established his domicile in the State of Michigan, sometime in the year 1880, as aforesaid, he was accompanied by the said Sarah Louise Welchman Olmsted and the said two sons, who thereupon became residents of the said State of Michigan, and who also had their domicile therein.

15 XII. That on or about the 23rd day of August, 1882, and after the said Benjamin F. Olmsted had procured the aforesaid judgment of divorce from the said Mary Jane Olmsted, he, the said Benjamin F. Olmsted, and the said Sarah Louise Welchman were duly and lawfully married in the said City of Detroit and State of Michigan, and lawfully lived together and cohabited there as husband and wife, until about the year 1887, when they removed to the City of Newark in the State of New Jersey, and there continued to live together in lawful wedlock, until the death of the said Sarah Louise Olmsted on or about January 20th, 1900.

XIII. That the said Benjamin F. Olmsted had no children other than plaintiff and the defendants, Mary O. Decker and Clarence E. Olmsted, and the defendant John H. Olmsted and William H. Olmsted, and also one Frank S. Olmsted, referred to in paragraph "Second" of the complaint.

XIV. That the said Benjamin F. Olmsted always recognized the said John H. Olmsted and William H. Olmsted to be his lawful sons, born as aforesaid and from time to time made his home with either or both of them, down to the day of his death, July 16th, 1905.

XV. That by an act duly passed by the Legislature in the State of Michigan on the 29th day of May, 1881, at which time the said Benjamin F. Olmsted and Sarah Louise Welchman Olmsted and the defendants John H. Olmsted and William H. Olmsted were residents of Michigan and had their permanent domicile there as aforesaid, and which act is now the Law of that State, it is provided, "When, after the birth of an illegitimate child, his parents shall intermarry, or without such marriage, if the father shall, by writing under his hand acknowledge such child as his child, such child shall be considered legitimate for all intents and purposes. *Provided*, 16 That such acknowledgment shall be executed and acknowledged in the same manner as may be by Law provided for the execution and acknowledgment of deeds of real estate, and be recorded in the office of the judge of probate of the county in which such father is at the time a resident. Approved, March 29th, 1881."

XVI. That by the marriage of the said Benjamin F. Olmsted and Sarah Louise Welchman Olmsted performed as aforesaid in the City of Detroit, State of Michigan, the defendant John H. Olmsted and William H. Olmsted became and ever since have been the legitimate children and lawful issue of the said Benjamin F. Olmsted, and each is lawfully entitled as such, to a share in the premises described in the complaint herein, equal to that of the other children of the said Benjamin F. Olmsted, to wit, the plaintiff, and the defendants, Mary O. Decker and Clarence E. Olmsted and the said Frank S. Olmsted.

Wherefore these defendants demand judgment that the said property be sold and the proceeds thereof be apportioned among the parties entitled thereof; and that if in the meantime the said defendant James H. Bird shall have lawfully sold the said premises under the power of sale in the said Will and Codicil of said Silas Olmsted, deceased, that the determination of the rights of the several

parties herein, be made to apply to the partition of the money received from such sale; and that the rights of all the parties hereto, in and to said property, or the proceeds thereof, be ascertained and determined and that the said defendants have such an allowance for costs and disbursements and extra allowance in this action as the Court may determine.

BYERS & SNYDER,
Att'ys for John H. Olmsted and William H. Olmsted,
41 *Park Row, Manhattan, New York City, N. Y.*

17 CITY AND COUNTY OF NEW YORK, *ss:*

John H. Olmsted being duly sworn, deposes and says, that he is one of the defendants above named, that the interests of himself and William H. Olmsted, who is his brother, are identical. That he is entirely familiar with the facts involved in this action; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

JOHN H. OLMSTED.

Sworn to before me, this 14th day of December, 1905.
WILLIAM A. KNAPP,
Notary Public, N. Y. Co.

18 *Answer of Mary O. Decker et al.*

New York Supreme Court, City and County of New York.

DANIEL H. OLMSTED, Plaintiff,
against
ELLEN A. OLMSTED, Wife of Daniel H. Olmsted; MARY O. DECKER, Frank S. Olmsted, Clarence E. Olmsted, and Estelle, His Wife; Frances A. Reynolds, and Delos Reynolds, Her Husband; Edwin Olmsted, Frederick D. Olmsted, and Ruth, His Wife; John H. Olmsted and Amelia, His Wife; William H. Olmsted and Grace, His Wife, and James H. Bird, as Executor under the Will of Silas Olmsted, Deceased, Defendants.

The defendants, Mary O. Decker, Clarence E. Olmsted, Estelle Olmsted and Ellen A. Olmsted, by their attorney, Read G. Dilworth, answering the complaint in this action,

Admit all the allegations contained in the Paragraphs "First," "Second," "Third," "Fourth," "Fifth," "Sixth," "Seventh," "Eighth," and "Ninth."

Wherefore, the defendants, Mary O. Decker, Clarence E. Olmsted, Estelle Olmsted and Ellen A. Olmsted, above named demand judgment that the said property be sold and the proceeds thereof apportioned among the parties entitled thereto, and that if in the meantime, the said defendant, James H. Bird, shall have lawfully sold

19 the said premises under the power of sale in the said will of said Silas Olmsted, deceased, contained, that the determination of the rights of the parties herein be made to apply to the partition of the money received from such sale; and that the rights of all the parties hereto in and to said property or the proceeds thereof be ascertained and determined and that the defendants Mary O. Decker, Clarence E. Olmsted, Estelle Olmsted and Ellen A. Olmsted, have the costs and disbursements of this action.

READ G. DILWORTH.

Attorney for Defendants, Mary O. Decker, Clarence E. Olmsted, Estelle Olmsted, and Ellen A. Olmsted.

Office and P. O. Address, 149 Church St., Borough of Manhattan, New York City.

CITY AND COUNTY OF NEW YORK, *ss:*

Read G. Dilworth, being duly sworn, deposes and says: That he is the attorney for Mary O. Decker, Clarence E. Olmsted, Estelle Olmsted and Ellen A. Olmsted, defendants in the above entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true; that the reason this verification is not made by the defendants in person is because all of the said defendants reside and are out of the County where the deponent has his office or resides.

READ G. DILWORTH.

Sworn to before me, this 3rd day of November, 1905.

JOHN C. YOGGINS,
Notary Public, N. Y. Co.

20 *Answer of James Bird.*

New York Supreme Court, City and County of New York.

DANIEL H. OLMSTED, Plaintiff,
against
ELLEN A. OLMSTED, Wife of Daniel H. Olmsted; MARY O. DECKER, Frank S. Olmsted, Clarence E. Olmsted, and Estelle, His Wife; Frances A. Reynolds, and Delos Reynolds, Her Husband; Edwin Olmsted, Frederick D. Olmsted, and Ruth, His Wife; John H. Olmsted and Amelia, His Wife; William H. Olmsted and Grace, His Wife, and James H. Bird, as Executor under the Will of Silas Olmsted, Deceased, Defendants.

The defendant James Bird as Executor under the Will of Silas Olmsted, deceased, separately answering the complaint herein respectfully alleges:

First. That he has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs "First," "Second" and "Third" of the complaint herein.

For a Separate Defense.

First. The defendant alleges that he is the Executor of the Last Will and Testament of Silas Olmsted, deceased, and that in and by said Will by the Sixteenth paragraph thereof the following power of sale is given to the Executor:

"Sixteenth. All the rest residue of my property, both real and sonal, wheresoever situate, including the house, lot and premises ate in the City and County of New York, adjoining the store, use, lot and premises above devised to my said son Charles Olm- l, shall as soon as practicable after my decease, be sold by my cutors or the survivors of them, at either public or private sale, their discretion for the best price they or he can obtain, the pro- ds whereof, after paying in full all my just debts, funeral ex- nses and the costs and expenses of carrying into effect and execut- g this Will, shall be by them or him divided amongst and paid my said sons and daughters herein named, share and share alike, e children of each of my said sons and daughters as now are, or my decease shall be, deceased, to take in equal shares, the share eir parents would have taken if living."

That a power of sale is also given to the Executor by the second aragraph of the first codicil to said Will as follows:

"Second. I revoke the clause of my said Will numbered "six- enth" so far only as the same shall apply to my house, lot and remises, situate in the City of New York, which is known as num- r five hundred (500) Washington Street; as to said house, lot and remises I direct my executors or the survivor of them to rent the me for five years after my decease, for the best price they shall able to obtain, in their discretion, during which term they shall ep the same fully insured and in good repair, and shall pay all xes, assessments, premiums for policies of insurance and charge r repairs, and other lawful charges against said property, and of the said rents and income thereof. The net proceeds of said 2 rents and income, after such payments, I give and bequeath in equal shares to my sons William F. Olmsted and Benjamin Franklin Olmsted, to be paid them from year to year, or quarterly, s such rents shall be received, the lawful issue of either or both, who shall die within said five years (of either or both), to take in equal shares the portion their father would have taken if living.

From and after the expiration of the said five years I give, devise and bequeath the said house, lot and premises to my sons William F. and Benjamin Franklin for and during the natural lifetime of both my said sons, and for and during the natural lifetime of the survivor of them. I give and devise the same to such survivor and the lawful issue of such of my said sons as shall be deceased, such issues to take and be entitled in equal shares, and share and share alike; from and after the death of both my said sons William F. and Benjamin Franklin, I give and devise one equal undivided one- half part of the said house, lot and premises, to the lawful issue of each of my said sons, such issue to take share and share alike;

the children of any deceased child of either of my said sons to take the share their parent would take if living.

All policies of insurance effected by my executors as above directed to be held by them for the benefit of my said sons William F. and Benjamin Franklin, and their lawful issue, and all moneys received thereon, if not expended by my said executors in repairs or in re-erections on said lot and premises for purposes of distribution to be deemed and treated as part of said house, lot and premises. From and after the death of both my said sons William F. and Benjamin Franklin, I direct my said executors, or the survivor of them, to sell all and singular my said house, lot and premises, number five hundred Washington Street, either at public or private sale, for the best price that can be obtained in their or his discretion and
23 to execute, acknowledge and deliver all necessary conveyances for the same, and after retaining the costs and expenses of such sale and conveyance to pay over the net proceeds of such sale to the parties entitled thereto as above provided."

Second. That on the 26th day of January, 1906, the defendant conveyed the premises described in the complaint herein for the sum of Eight thousand dollars ($8,000) and gave title thereto as executor of the Will of Silas Olmsted, deceased. That the title to said premises was examined on behalf of the purchaser by the Title Insurance Company of New York, and the trust created by the second paragraph of the first codicil was declared void for the reason that it unlawfully suspended the absolute power of alienation in that the executors were directed to rent the premises for a period of five years after the decease of the testator. That the title was rejected by the said Title Company on the power of sale contained in the second paragraph of the said first codicil but was passed under the power of sale contained in the sixteenth paragraph of said Will.

Third. That the said defendant as Executor of the Will of Silas Olmsted, deceased, has in his possession the proceeds derived from the sale of the premises described in the complaint herein awaiting the determination of this Court as to whether the said proceeds should be distributed among the persons mentioned in the second paragraph of said first codicil or among those who would take under the sixteenth paragraph of said Will.

Wherefore the defendant asks that a judicial construction of the second paragraph of the first codicil of said Will of Silas Olmsted, deceased, may be made by this Court to the end that it may be adjudged and determined whether or not the said codicil unlawfully suspends the absolute power of alienation of such
24 portion of the estate as is embraced therein and that this defendant have such other or further relief in the premise as may be just.

SETH BIRD,
Attorney for Defendant, James Bird.

Office & P. O. Address, National Bank Building, Tarrytown, New York.

ATE OF NEW YORK,
County of Westchester, ss:

James Bird being duly sworn deposes and says that he is one of
defendants in this action; that he has read the foregoing answer
l knows the contents thereof; that the same is true to the knowl-
e of deponent, except as to the matters therein stated to be alleged
information and belief, and as to those matters he believes it to be
.

JAMES BIRD.

sworn to before me, this 15th day of February, 1906.
W. J. JIVEN,
Notary Public.

Agreed Statement of Facts.

New York Supreme Court, City and County of New York.

DANIEL H. OLMSTED, Plaintiff,
against
EN A. OLMSTED, Wife of Daniel H. Olmsted; MARY O. DECKER,
rank S. Olmsted, Clarence E. Olmsted and Estelle, His Wife;
rances A. Reynolds and Delos Reynolds, Her Husband; Edwin
lmsted, Frederick D. Olmsted and Ruth, His Wife; John H.
lmsted and Amelia, His Wife; William H. Olmsted and Grace,
is Wife; and James Bird, as Executor under the Will of Silas
lmsted, Deceased, Defendants.

atement of facts agreed upon, for the purpose of the trial of this
on, by all the parties who have appeared herein.
las Olmsted, late of Tarrytown, New York, died in 1874, seized
possessed of the premises described in the complaint in this
on, the same being devised by him in and by a certain first codi-
f his will, which, with the will, was duly admitted to probate
provisions of the codicil and the provisions of the will concern-
ing this property, are as follows:

Paragraph Sixteenth of the Will: "All the rest and resi-
due of my property both real and personal, wheresoever situ-
ncluding the house, lot and premises situate in the City and
ty of New York, adjoining the store, house, lot and premises
e devised to my said son Charles Olmsted, shall as soon as prac-
le after my decease, be sold by my executors or the survivors
em at either public or private sale in their discretion for the
price they or he can obtain, the proceeds whereof after paying
ll all my just debts funeral expenses, and the costs and expenses
rrying into effect and executing this Will, shall be by them or
divided amongst and paid to my said sons and daughters herein
d share and share alike, the children of each of my said sons
daughters as now are or at my decease shall be deceased to take
ual shares, the share their parents would have taken if living.

Paragraph Second of the First Codicil: I revoke the clause of my said Will "sixteenth" so far only as the same shall apply to my house, lot and premises, situate in the City of New York, which is known as number five hundred (500) Washington Street; as to said house, lot and premises, I direct my executors or the survivors of them to rent the same for five years after my decease, for the best price they shall be able to obtain in their discretion during which term they shall keep the same fully insured and in good repair and shall pay all taxes, assessments, premiums for policies of insurance and charge for repairs, and other lawful charges against said property and of the said rents and income thereof. The net proceeds of said rents and income after such payments, I give and bequeath in equal shares to my sons William F. Olmsted and Benjamin Franklin Olmsted to be paid them from year to year or quarterly as such rents shall be received, the lawful issue of either or both, who shall die within said five years, (of either or both), to take in equal shares the portions *of* their father would have taken if living.

27 From and after the expiration of the said five years I give, devise and bequeath the said house, lot and premises to my said sons William F. and Benjamin Franklin for and during the natural life time of both my said sons and for and during the natural life time of the survivor of them. I give and devise the same to such survivor and the lawful issue of such of my said sons as shall be deceased, such issues to take and be entitled in equal shares and share and share alike; from and after the death of both of my said sons William F. and Benjamin Franklin, I give and devise one equal undivided, one-half part of the said house, lot and premises to the lawful issue of each of my said sons, such issue to take share and share alike, the children of any deceased, child of either of my said sons to take the share their parent would have taken if living.

All policies of insurance effected by my executors as above directed to be held by them for the benefit of my said sons William F. and Benjamin Franklin, and their lawful issue, and all moneys received thereon if not expended by my said executors in repairs or in re-erections on said lot and premises for purposes of distribution to be deemed and treated as part of said house, lot and premises. From and after the death of both my said sons William F., and Benjamin Franklin, I direct my said executors or the survivor of them to sell all and singular my said house, lot and premises, number five hundred Washington street, either at public or private sale for the best price that can be obtained in their or his discretion and to execute, acknowledge and deliver all necessary conveyances for the same and after retaining the costs and expenses of such sale and conveyance to pay over the net proceeds of such sale to the parties entitled thereto as above provided."

The two sons of Silas Olmsted named in the said codicil, William F. Olmsted died July 30, 1868, and Benjamin F. Olmsted,

28 survived the said Silas Olmsted. The five years during which the premises were to be rented by the executors, expired during the lifetime of said son Benjamin. The said William F.

lmsted died leaving as his lawful issue, the defendants Frances . Reynolds, Edwin Olmsted and Frederick D. Olmsted. The said enjamin F. Olmsted died July 16, 1905, leaving issue.

Benjamin F. Olmsted married Mary Jane Olmsted in the State New York, December 25, 1850, and the issue of said marriage as four children, to wit: the plaintiff Daniel H. Olmsted, the de-ndants Mary O. Decker and Clarence E. Olmsted, and one Frank Olmsted; that the latter named Frank S. Olmsted left the State efore the year 1880, but his whereabouts since that time have been nknown, and it has been impossible to get any information con-rning him.

That the said Mary Jane Olmsted lived in and was a resident of e State of New York from the time of her marriage to her death, nd was never in the State of Michigan.

That on February 28, 1874, the said Benjamin F. Olmsted per-rmed a marriage ceremony with one Sarah Louise Welchman in e State of New Jersey and by her had two sons who are the defend-nts John H. Olmsted and William H. Olmsted; that some time dur-g the summer of 1880, the said Benjamin F. Olmsted, the said arah Louise Welchman, with their children the said John H. Olm-ed and William H. Olmsted, became residents of the State of ichigan and took up permanent domicile there; that thereafter nd on the 10th day of February, 1882, the Circuit Court for the unty of Wayne, State of Michigan, on the application of the id Benjamin F. Olmsted, reciting that he then was and had been r more than a year past a resident of said State of Michigan, sued a subpœna directing said Mary Jane Olmsted to appear and efend in an action brought by said Benjamin F. Olmsted for di-vorce under the laws of the State of Michigan, upon the ground of extreme cruelty and desertion; that said subpœna was never personally served upon the said Mary Jane lmsted, and on proof that said Mary Jane Olmsted was not resident and could not be found within the State of Michi-n, but was a resident of the State of New York, service of e subpœna was ordered to be made upon said Mary Jane lmsted by publication in the "Detroit Every Saturday," blished in the said Wayne County, Michigan; that there-ter, the time of said publication having expired and the said ary Jane Olmsted not having appeared or answered or having en served personally, judgment was taken by said Benjamin F. lmsted for the dissolution of the marriage, in said Circuit Court Wayne County, Michigan, on the 19th day of June, 1882. That ereafter and on the 22nd day of August, 1882, in the City of troit, Michigan, the said Benjamin F. Olmsted again performed marriage ceremony with the said Sarah Louise Welchman and lived th her until the time of his death.

That in June, 1883, the said Mary Jane Olmsted commenced an tion in the Supreme Court of the State of New York against the id Benjamin F. Olmsted and others demanding a decree of paration against the said Benjamin F. Olmsted and asking r alimony, counsel fee, and the application of the property

of the said Benjamin F. Olmsted for the purpose of furnishing the money required therefor. That in such action, the judgment roll shows that the said Benjamin F. Olmsted was represented by Andrew Blake, Esq., his attorney, on a motion for the sequestration of the property of the said Benjamin F. Olmsted to pay the alimony, &c., decreed in the judgment; that on the 22nd day of January, 1885, judgment was entered for the plaintiff and against the defendants, separating the said Mary Jane Olmsted and Benjamin F. Olmsted from bed and board; also requiring the payment of certain monies by way of alimony, &c.

30 That thereafter an appeal from the order above referred to, was taken to the then General Term of the Supreme Court, May 4, 1885, the said Benjamin F. Olmsted being represented by Andrew Blake, Esq., on said appeal, the other defendants, by Calvin Frost, Esq., and the order was duly affirmed October, 1885.

That the premises described in the complaint herein was sold by the executor, James Bird, sometime after the commencement of this action.

That the above named Sarah Louise Welchman Olmsted died January 30, 1900; that the said Mary Jane Olmsted died January 22, 1902; and the said Benjamin died July 16, 1905.

That the parties appearing herein are, Daniel H. Olmsted, plaintiff, by Charles H. Luscomb, his attorney; Ellen A. Olmsted, Mary O. Decker, Clarence E. Olmsted and Estelle, his wife, by Read G. Dilworth, Esq., their attorney; John H. Olmsted and Amelia, his wife, and William H. Olmsted and Grace, his wife, by Byers & Snyder, Esqs., and James Bird, as executor, by Seth Bird, esq., his attorney.

That an Act passed by the legislature of the State of Michigan on the 29th day of May, at which date the said Benjamin F. Olmsted, the said Sarah Louise Welchman, and the defendants John H. Olmsted and William H. Olmsted were residents of Michigan, providing that the child shall be considered legitimate, his parents marrying after his birth, approved March 29, 1881, may be offered in evidence as a part of this stipulation.

That a copy of the proceedings in the Circuit Court for the County of Wayne, Michigan, certified to by Louis W. Himes, Deputy Clerk of said Court, in the action of Benjamin Franklin Olmsted against Mary Jane Olmsted, and a printed copy of the papers on appeal in the New York Supreme Court, General Term, in the case of May J. Olmsted against Benjamin F. Olmsted, James Bird and

31 others, the notice of appeal in which action is dated May 4, 1885, may be offered and received in evidence on the trial of this action.

That in and by the provisions of a compromise judgment in the case of Cyrus Olmsted, et al., against James Bird, et al., dated April 24, 1883, entered by consent of all those having any interest in the estate of the late Silas Olmsted, deceased, the distribution of all his real property was provided for, and the premises described in the complaint in this action, were assured to the therein mentioned

William F. Olmsted and Benjamin F. Olmsted, as stated in the first codicil to said Silas Olmsted's will. And it is stipulated that said compromise judgment may be received in evidence in this action.

Dated, New York, March 16th, 1906.

CHARLES H. LUSCOMB, *Pltf's Atty.*
SETH BIRD,
Att'y for James Bird, Executor
BYERS & SNYDER,
Att'ys for John H. & Wm. H. Olmsted and Their Respective Wives.
READ G. DILWORTH,
Att'y for Ellen A. Olmsted, Mary O. Decker, Clarence E. Olmsted & Wife.

32 *Findings.*

New York Supreme Court, City and County of New York.

DANIEL H. OLMSTED, Plaintiff,
against
ELLEN A. OLMSTED, Wife of Daniel H. Olmsted; MARY O. DECKER, Frank S. Olmsted, Clarence E. Olmsted, and Estelle, His Wife; Frances A. Reynolds, and Delos Reynolds, Her Husband; Edwin Olmsted, Frederick D. Olmsted and Ruth, His Wife, John H. Olmsted and Amelia, His Wife; William H. Olmsted and Grace, His Wife; and James H. Bird, as Executor under the Will of Silas Olmsted, Deceased, Defendants.

The issues in the above entitled action having been brought on for trial before me at a Special Term, Part III, of said Court, on the 7th day of May, 1906, after hearing the allegations and proof upon the part of the plaintiff and the several defendants, and the agreed statement of facts, the said plaintiff appearing by Charles H. Luscomb, his attorney, the defendant Ellen A. Olmsted, Mary O. Decker, Clarence E. Olmsted and Estelle, his wife, by Read G. Dilworth, Esq., their attorney, and defendants John H. Olmsted and Amelia, his wife, and William H. Olmsted, and Grace, his wife, by Byers & Snyder, Esqs., their attorneys, and the defendant James Bird, as executor, by Seth Bird, Esq., his attorney, all parties in interest being duly in Court, I find as follows:

33 *Findings of Fact.*

First. Silas Olmsted, late of Tarrytown, New York, died in 1874, seized and possessed of the premises described in the complaint in this action, the same being devised by him in and by certain first codicil of his will, which with the will was duly admitted to probate. The provisions of the codicil and the provisions of the will concerning this property, are as follows:

Paragraph Sixteenth of the Will: All the rest and residue of my property both real and personal, wheresoever situate including the

house, lot and premises, situate in the City and County of New York adjoining the store house lot and premises above devised to my said son Charles Olmsted, shall as soon as practicable after my decease, be sold by my executors or the survivors of them at either public or private sale in their discretion for the best price they or he can obtain, the proceeds whereof after paying in full all my just debts funeral expenses, and the costs and expenses of carrying into effect and executing this will, shall be by them or him divided amongst and paid to my said sons and daughters herein named, share and share alike, the children of each of my said sons and daughters as now are or at my decease shall be deceased to take in equal shares, the share their parents would have taken if living.

Paragraph Second of the First Codicil: I revoke the clause of my said Will numbered "sixteenth" so far only as the same shall apply to my house, lot and premises, situate in the City of New York, which is known as number five hundred (500) Washington street, as to said house, lot and premises, I direct my executors or the survivors of them to rent the same for five years after my decease, for the best price they shall be able to obtain in their discretion during which term they shall keep the same fully insured and in good
34 repair, and shall pay all taxes, assessments, premiums for policies of insurance and charge for repairs, and other lawful charges against said property and of the said rents and income thereof. The net proceeds of said rents and income after such payments, I give and bequeath in equal shares to my sons William F. Olmsted and Benjamin Franklin Olmsted to be paid them from year to year or quarterly as such rents shall be received, the lawful issue of either or both, who shall die within said five years, (of either or both), to take in equal shares the portions their father would have taken if living.

From and after the expiration of the said five years I give, devise and bequeath the said house, lot and premises to my said sons William F. and Benjamin Franklin for and during the natural lifetime of both my said sons and for and during the natural lifetime of the survivor of them. I give and devise the same to such survivor and the lawful issue of such of my said sons as shall be deceased, such issue to take and be entitled in equal shares, and share and share alike; from and after the death of both my said sons William F. and Benjamin Franklin, I give and devise one equal undivided, one-half part of the said house, lot and premises to the lawful issue of each of my said sons, such issue to take, share and share alike, the children of any deceased child or either of my said sons to take the share their parents would have taken if living.

All policies of insurance effected by my executors as above directed to be held by them for the benefit of my said sons William F. and Benjamin Franklin, and their lawful issue, and all moneys received thereon if not expended by my said executors in repairs or in re-erection on said lot and premises for purposes of distribution to be deemed and treated as part of said house, lot, and premises. From and after the death of both my said sons William F. and Benjamin Franklin, I direct my said executors or the survivor
55 of them to sell all and singular my said house, lot and premises, number five hundred Washington Street, either at public

or private sale for the best price that can be obtained in their or his discretion and to execute, acknowledge and deliver all necessary conveyances for the same and after retaining the costs and expenses of such sale and conveyance to pay over the net proceeds of such sale to the parties entitled thereto, as above provided.

That said premises have been since the commencement of this action sold by the said executor, the defendant James Bird, and that he now holds in his possession and subject to the decree of the Court in this action, the sum of Eight thousand dollars, with interest from January 26, 1906.

Second. The two sons of Silas Olmsted named in said codicil, William F. Olmsted died July 30, 1858, and Benjamin F. Olmsted, survived the said Silas Olmsted. The five years during which the premises were to be rented by the executors, expired during the lifetime of said son Benjamin. The said William F. Olmsted died leaving as his lawful issue, the defendants Frances A. Reynolds, Edwin Olmsted and Frederick D. Olmsted. The said Benjamin F. Olmsted died July 16, 1905, leaving issue.

Third. Benjamin F. Olmsted married Mary Jane Olmsted in the State of New York, December 25, 1850, and the issue of said marriage was four children, to wit: the plaintiff, Daniel H. Olmsted, the defendants Mary O. Decker and Clarence E. Olmsted, and one Frank S. Olmsted; that the latter named Frank S. Olmsted left the State before the year 1880, but his whereabouts since that time have been unknown, and it has been impossible to get any information concerning him.

Fourth. That the said Mary Jane Olmsted lived in and was a resident of the State of New York from the time of her marriage to her death, and was never in the State of Michigan.

Fifth. That on February 28, 1874, the said Benjamin Olmsted performed a marriage ceremony with one Sarah Louise Welchman in the State of New Jersey and by her had two sons who are the defendants John H. Olmsted and William H. Olmsted; that sometime during the summer of 1880, the said Benjamin F. Olmsted, the said Sarah Louise Welchman, with their children the said John H. Olmsted and William H. Olmsted, became residents of the State of Michigan and took up permanent domicile there; that thereafter and on the 10th day of February, 1882, the Circuit Court for the County of Wayne, State of Michigan, on the application of the said Benjamin F. Olmsted, reciting that he then was and had been for more than a year past a resident of said State of Michigan, issued a subpœna directing said Mary Jane Olmsted to appear and defend in an action brought by said Benjamin F. Olmsted for divorce under the laws of the State of Michigan, upon the ground of extreme cruelty and desertion; that said subpœna was never personally served upon the said Mary Jane Olmsted, and on proof that said Mary Jane Olmsted was not a resident and could not be found within the State of Michigan, but was a resident of the State of New York, service of the subpœna was ordered to be made upon said Mary Jane Olmsted by publication in the "Detroit Every Saturday," published in the said Wayne County, Michigan; that thereafter, the time of said publication having expired and the said

Mary Jane Olmsted not having appeared or answered or having been served personally, judgment was taken by said Benjamin F. Olmsted for the dissolution of the marriage, in said Circuit Court of Wayne County, Michigan, on the 19th day of June, 1882. That thereafter and on the 22nd day of August, 1882, in the City of Detroit, Michigan, the said Benjamin F. Olmsted again performed a marriage ceremony with the said Sarah Louise Welchmann and lived with her until the time of her death.

37 Sixth. That in June, 1883, the said Mary Jane Olmsted commenced an action in the Supreme Court of the State of New York against the said Benjamin F. Olmsted and others, setting forth in her complaint that in June, 1870, said Benjamin F. Olmsted deserted and abandoned her and her children at Newburgh, New York, and took up his abode in New Jersey, demanding a decree of separation against the said Benjamin Olmsted and asking for alimony, counsel fee and the application of the property of the *the* said Benjamin F. Olmsted for the purpose of furnishing the money required therefor. That in said action, the judgment roll shows that the said Benjamin F. Olmsted was represented by Andrew Blake, Esq., his attorney, on a motion for the sequestration of the property of the said Benjamin F. Olmsted to pay the alimony, &c., decreed in the judgment; that on the 22nd day of January, 1885, judgment was entered in said action for the plaintiff and against the defendants, separating the said Mary Jane Olmsted and Benjamin F. Olmsted from bed and board; also requiring the payment of certain monies by way of alimony, &c.

And that thereafter an appeal from the order above referred to, was taken to the then General Term of the Supreme Court, May 4, 1885, the said Benjamin F. Olmsted being represented by Andrew Blake, Esq., on said appeal, the other defendants, by Calvin Frost, Esq., and the order was duly affirmed October, 1885.

Seventh. That the premises described in the complaint herein were sold by the executor James Bird some time after the commencement of this action.

Eighth. That the above named Sarah Louise Welchman died January 30, 1900; that the said Mary Olmsted died January 22, 1902; and the said Benjamin F. Olmsted died July 16, 1905.

Ninth. That an act was passed by the legislature of the State of Michigan on the 29th day of May, 1881, at which date the

38 said Benjamin F. Olmsted, the said Sarah Louise Welchman, and the defendants John H. Olmsted and William H. Olmsted were residents of Michigan, providing that the child shall be considered legitimate, his parents marrying after his birth, and was approved March 29, 1881.

Tenth. That in and by the provisions of a compromise judgment in the case of Cyrus Olmsted, et al., against James Bird, et al., dated April 21, 1883, entered by consent of all those having any interest in the estate of the late Silas Olmsted, deceased, the distribution of all his real property was provided for, and the premises described in the complaint in this action, were assured to the therein mentioned William F. Olmsted and Benjamin F. Olmsted, as stated in the first codicil to said Silas Olmsted's will.

And I Find as Conclusions of Law.

First. That the said sum of Eight Thousand dollars, with interest from January 26, 1903, being the proceeds of the sale by the said defendant executor, and all rents collected therefrom, represent and stand in the place of the premises described in the complaint and for the partition of which this action was brought, and it is to be divided between the lawful issue of said Benjamin F. Olmsted and William F. Olmsted.

Second. That such lawful issue are as follows:

Of Benjamin F. Olmsted, the plaintiff, Daniel H. Olmsted, and defendants Mary O. Decker, Clarence E. Olmsted and Frank S. Olmsted, each of whom is entitled to a one-fourth part of said Benjamin F. Olmsted's one-half share thereof.

Of William F. Olmsted, the defendants Frances A. Reynolds, Edwin Olmsted and Frederick D. Olmsted, each of whom is entitled to a one-third part of said William F. Olmsted's one-half share thereof.

39 Third. That the defendants John H. Olmsted and William H. Olmsted, the children of said Benjamin F. Olmsted and Sarah Louise Welchman, are not lawful issue of Benjamin F. Olmsted and are not entitled to any share in said property or said money.

Fourth. That judgment enter herein directing said defendant executor, James Bird, to pay and distribute said money now in his hands in accordance with the foregoing findings, after payment of the taxable costs and allowance of this action and an allowance under section 3253 of the Code of Civil Procedure, as follows:

To the plaintiff, his taxable costs and an allowance of Two hundred and fifty 00/100 dollars.

To the defendants Ellen A. Olmsted, Mary O. Decker, Clarence E. Olmsted and Estelle, his wife, who have appeared herein and answered by Read G. Dilworth, Esq., their attorney, taxable costs and an allowance of One hundred 00/100 dollars.

To the defendant executor, James Bird, who has appeared herein and answered by Seth Bird, Esq., his attorney, taxable costs and allowance of Fifty dollars.

Dated, New York, July 24, 1903.

SAMUEL GREENBAUM
Justice of the Supreme Court.

40 *Decree.*

New York Supreme Court. City of and County of New York.

DANIEL H. OLMSTED, Plaintiff,
against
ELLEN A. OLMSTED, Wife of Daniel H. Olmsted; MARY O. DECKER, Frank S. Olmsted, Clarence E. Olmsted, and Estelle, His Wife; Frances A. Reynolds, and Delos Reynolds, Her Husband; Edwin Olmsted, Frederick D. Olmsted and Ruth, His Wife; John H. Olmsted and Amelia, His Wife; William H. Olmsted and Grace, His Wife; and James Bird, as Executor under the Will of Silas Olmsted, deceased, Defendants.

The above entitled action having been brought on for trial before Mr. Justice Samuel Greenbaum at a Special Term, Part III, of the Supreme Court, held at the County Court House in the City and County of New York, on the 7th day of May, 1906, and the allegations and proofs of the said parties having been duly heard; the said plaintiff appearing herein by Charles H. Luscomb, his attorney; and the defendants Ellen A. Olmsted, Mary G. Decker, Clarence E. Olmsted and Estelle, his wife, by Read G. Dilworth, Esq., their attorney; and defendants John H. Olmsted and Amelia, his wife, and William H. Olmsted and Grace, his wife, by Byers &
41 Snyder, Esqs., their attorneys; and the defendant James Bird, as executor by Seth Bird, Esq., his attorney all parties in interest being duly in Court, and the Court having made its findings of fact as follows:

Findings of Fact.

First. Silas Olmsted, late of Tarrytown, New York, died in 1874, seized and possessed of the premises described in the complaint in this action, the same being devised by him in and by a certain codicil of his will, which, with the will, was duly admitted to probate. The provisions of the codicil and the provisions of the will concerning this property, are as follows:

Paragraph Sixteenth of the Will: All the rest and residue of my property both real and personal, wheresoever situate including the house, lot and premises situate in the City and County of New York, adjoining the store, house lot and premises above devised to my said son Charles Olmsted, shall as soon as practicable after my decease, be sold by my executors or the survivors of them at either public or private sale in their discretion for the best price they or he can obtain, the proceeds whereof after paying in full all my just debts funeral expenses, and the costs and expenses of carrying into effect and executing this Will, shall be by them or him divided amongst and paid to my said sons and daughters herein named, share and share alike, the children of each of my said sons and daughters as now are or at my decease shall be deceased to take in equal shares, the share their parents would have taken if living.

Paragraph Second of the First Codicil: I revoke the clause of my
l Will numbered "Sixteenth" so far only as the same shall apply
my house, lot and premises, situate in the City of New York,
ich is known as number five hundred (500) Washington street,
as to said house, lot and premises, I direct my executors or
the survivors of them to rent the same for five years after
my decease, for the best price they shall be able to obtain in
ir discretion during which term they shall keep the same fully
ired and in good repair, and shall pay all taxes, assessments,
miums for policies of insurance and charge for repairs, and
er lawful charges against said property and of the said rents
l income thereof. The net proceeds of said rents and income
r such payments, I give and bequeath in equal shares to my
s William F. Olmsted and Benjamin Franklin Olmsted to be paid
m from year to year or quarterly as such rents shall be received,
lawful issue of either or both, who shall die within said five
rs, (of either or both), to take in equal shares the portions their
ner would have taken if living.

From and after the expiration of the said five years I give, devise
l bequeath the said house, lot and premises to my said sons Wil-
m F. and Benjamin Franklin for and during the natural lifetime
both my said sons and for and during the natural lifetime of the
vivor of them. I give and devise the same to such survivor and
lawful issue of such of my said sons as shall be deceased, such
e to take and be entitled in equal shares, and share and share
e; from and after the death of both my said sons William F. and
njamin Franklin, I give and devise one equal undivided, one-half
t of the said house, lot and premises to the lawful issue of each of
said sons, such issue to take share and share alike, the children
any deceased, child of either of my said sons to take the share
ir parent would have taken if living.

All policies of insurance effected by my executors as above directed
be held by them for the benefit of my said sons William F. and
njamin Franklin, and their lawful issue, and all monies received
reon if not expended by my said executors in repairs or in re-
ctions on said lot and premises for purposes of distribution to *be*
deemed and treated as part of said house, lot and premises.
From and after the death of both my said sons William F.,
and Benjamin Franklin, I direct my said executors or the
vivor of them to sell all and singular my said house, lot and
mises, number five hundred Washington street, either at public
private sale for the best price that can be obtained in their or
discretion and to execute, acknowledge and deliver all necessary
nveyances for the same and after retaining the costs and expenses
such sale and conveyance to pay over the net proceeds of such
to the parties entitled thereto as above provided.

That the said premises have been since the commencement of
action sold by the said executor, the defendant James Bird, and
t he now holds in his possession and subject to the decree of the
rt in this action the sum of Eight thousand dollars ($8,000.00),
h interest from January 26, 1906

Second. The two sons of Silas Olmsted named in the said codicil, William F. Olmsted died July 30, 1868, and Benjamin F. Olmsted, survived the said Silas Olmsted. The five years during which the premises were to be rented by the executors, expired during the lifetime of said son Benjamin. The said William F. Olmsted died leaving as his lawful issue, the defendants Frances A. Reynolds, Edwin Olmsted and Frederick D. Olmsted. The said Benjamin F. Olmsted died July 15, 1905, leaving issue.

Third. Benjamin F. Olmsted married Mary Jane Olmsted in the State of New York, December 25, 1850, and the issue of said marriage were four children, to wit: The plaintiff, Daniel H. Olmsted, the defendants Mary O. Decker and Clarence E. Olmsted, and one Frank S. Olmsted; that the latter named Frank S. Olmsted left the State before the year 1880, but his whereabouts since that time have been unknown, and it has been impossible to get information concerning him.

44 Fourth: That the said Mary Jane Olmsted lived in and was a resident of the State of New York, from the time of her marriage to her death, and was never in the State of Michigan.

Fifth. That on February 28, 1874, the said Benjamin F. Olmsted performed a marriage ceremony with one Sarah Louise Welchman in the State of New Jersey and by her had two sons who are the defendants John H. Olmsted and William H. Olmsted; that some time during the summer of 1880, the said Benjamin F. Olmsted, the said Sarah Louise Welchman, with their children the said John H. Olmsted and William H. Olmsted, became residents of the State of Michigan and took up permanent domicile there; that thereafter and on the 10th day of February, 1882, the Circuit court for the County of Wayne, State of Michigan, on the application of the said Benjamin F. Olmsted, reciting that he then was and had been for more than a year past a resident of said State of Michigan, issued a subpœna directing said Mary Jane Olmsted to appear and defend in an action brought by said Benjamin F. Olmsted for divorce under the laws of the State of Michigan upon the ground of extreme cruelty and desertion; that said subpœna was never personally served upon the said Mary Jane Olmsted, and on proof that said Mary Jane Olmsted was not a resident and could not be found within the State of Michigan, but was a resident of the State of New York, service of the subpœna was ordered to be made upon said Mary Jane Olmsted by publication of the "Detroit Every Saturday," published in the said County of Wayne, Michigan; that thereafter, the time of said publication having expired and the said Mary Jane Olmsted not having appeared or answered or having been served personally, judgment was taken by said Benjamin F. Olmsted for the dissolution of the marriage, in said Circuit Court of Wayne County, Michigan, on the 19th day of June, 1882. That

45 thereafter and on the 22nd day of August, 1882, in the City of Detroit, Michigan, the said Benjamin F. Olmsted again performed a marriage ceremony with the said Sarah Louise Welchman and lived with her until the time of her death.

Sixth. That in June 1883, the said Mary Jane Olmsted com-

menced an action in the Supreme Court of the State of New York against the said Benjamin F. Olmsted and others, setting forth in her complaint that in June 1870, said Benjamin F. Olmsted deserted and abandoned her and her children at Newburgh, New York, and took up his abode in New Jersey, demanding a decree of separation against the said Benjamin F. Olmsted and asking for alimony, counsel fee, and the application of the property of the said Benjamin F. Olmsted for the purpose of furnishing the money required therefor. That in such action, the judgment roll shows that the said Benjamin F. Olmsted was represented by Andrew Blake, Esq., his attorney, on a motion for the sequestration of the property of the said Benjamin F. Olmsted to pay the alimony, &c., decreed in the judgment; that on the 22nd day of January, 1885, judgment was entered in said action for the plaintiff and against the defendants, separating the said Mary Jane Olmsted and Benjamin F. Olmsted from bed and board; also requiring the payment of certain monies by way of alimony, &c.

And that thereafter an appeal from the order above referred to, was taken to the then General Term of the Supreme Court, May, 1883, the said Benjamin F. Olmsted being represented by Andrew Blake, Esq., on said appeal, the other defendants, by Calvin Frost, Esq., and the order was duly affirmed October, 1885.

Seventh. That the premises described in the complaint herein were sold by the executor James Bird some time after the commencement of this action.

Eighth. That the above named Sarah Louise Welchman died January 30, 1900; that the said Mary Jane Olmsted died January 22, 1902; and the said Benjamin F. Olmsted died July, 16, 1905.

Ninth. That an act was passed by the legislature of the State of Michigan on the 29th day of May, 1881, at which date the said Benjamin F. Olmsted, the said Sarah Louise Welchman and the defendants John H. Olmsted and William H. Olmsted were residents of Michigan, providing that the child shall be considered legitimate, his parents marrying after his birth, and was approved March 29, 1881.

Tenth. That in and by the provisions of a compromise judgment in the case of Cyrus Olmsted, *et al.*, against James Bird, *et al.*, dated April 24, 1883, entered by consent of all those having any interest in the estate of the late Silas Olmsted, deceased, the distribution of all his real property was provided for, and the premises described in the complaint in this action, were assured to the therein mentioned William F. Olmsted and Benjamin F. Olmsted, as stated in the first codicil to said Silas Olmsted's will.

Now, therefore, it is adjudged and decreed as follows:

First. That the said sum of Eight thousand dollars ($8,000.00), with interest from January 26, 1906, being the proceeds of the sale by the said defendant executor, and all rents collected thereupon, represents and stands in the place of the premises described in the complaint and for the partition of which this action was brought, and is to be divided between the lawful issue of said Benjamin F. Olmsted and William F. Olmsted.

Second. That such lawful issue are as follows:

Of Benjamin F. Olmsted, the plaintiff, Daniel H. Olmsted, and defendants Mary O. Decker, Clarence E. Olmsted and Frank S. Olmsted, each of whom is entitled to a one-fourth part of said Benjamin F. Olmsted's one-half share thereof.

Of William F. Olmsted, the defendants Frances A. Reynolds, Edwin Olmsted and Frederick D. Olmsted, each of whom is entitled to a one-third part of said William F. Olmstead's one-half share thereof.

47

Third. That the defendants John H. Olmsted and William H. Olmsted, the children of said Benjamin F. Olmsted and Sarah Louise Welchman, are not lawful issue of Benjamin F. Olmsted, and are not entitled to any share in said property or said money.

Fourth. That the said defendant executor, James Bird, forthwith pay and distribute said monies now in his hands to and among the persons and in the proportions stated in section "Second" of this judgment after payment from said monies of the taxable costs and allowance of this action, and allowance under Section 3253 of the Code of Civil Procedure, as follows:

To the plaintiff, his taxable costs, amounting to One hundred and ninety-nine dollars, and an allowance of Two hundred and fifty 00/100 ($250) dollars.

To the defendants Ellen A. Olmsted, Mary O. Decker, Clarence E. Olmsted and Estelle, his wife, who have appeared herein and answered by Read G. Dilworth, Esq., their attorney, taxable costs, amounting to ninety and 51/100 dollars, and an allowance of One hundred 00/100 (100) dollars.

To the defendant-executor, James Bird, who has appeared herein and answered by Seth Bird, Esq., his attorney, taxable costs, amounting to Eighty-five dollars, and an allowance of fifty and 00/100 ($50) dollars.

And that an execution may be issued therefor.

Dated, New York, July 24th, 1906.

Enter,

S. G., *J. S. C.*
SAMUEL GREENBAUM.
Justice of the Supreme Court.

48

Requests and Refusals to Find.

(Submitted on Behalf of Defendants John H. & William H. Olmsted.)

Supreme Court, State of New York, County of New York.

DANIEL H. OLMSTED, Plaintiff,
against
ELLEN A. OLMSTED et al., Defendants.

Statement of Facts.

I. Silas Olmsted died seized and possessed of the premises described in the complaint, which are situated in this county and state.

. They have been sold by the defendant James Bird, executor
s will.
I. The proceeds are in the hands of the executor awaiting dis-
tion in accordance with the decree to be entered herein.
'. One half of the said proceeds passes to the "lawful issue" of
amin F. Olmsted, deceased.
The plaintiff Daniel H. Olmsted and the defendants Mary O.
ter, Frank S. Olmsted and Clarence E. Olmsted are "lawful
" of said Benjamin F. Olmsted.
I. Benjamin F. Olmsted married Mary Jane Olmsted in New
k in 1850, and the said last named persons were the issue of
marriage.
II. In 1874 Benjamin F. Olmsted went through a marriage
mony with Sarah Louise Welchman, in the State of New Jer-
and they lived together as man and wife until her death in
1900.
VIII. Prior to 1880 two sons were born in the State of
New Jersey to said last named persons, who are the defend-
John H. and William H. Olmsted.
X. Sometime during the summer of 1880, Benjamin F. Olm-
the said Sarah Louise and their two said sons, became resi-
s of, and took up their permanent domicile in, the State of
igan.
In 1882 Benjamin F. Olmsted brought an action in the Cir-
Court of Michigan, against said Mary Jane Olmsted his first
upon the grounds of desertion and cruelty, the service of pro-
being by publication, and on June 19th, 1882, a decree was
ed in accordance with the laws of Michigan, upon default, in
of Benjamin and against Mary Jane dissolving their mar-
.
I. Benjamin F. Olmsted was married to the said Sarah Louise
lhman, by a ceremonial marriage, in Detroit Michigan on or
t August 22nd, 1882.
II. At that time by a statute then and still in force in Michigan,
hildren of parents born out of wedlock become legitimate when
arents inter-marry.
III. By virtue the said marriage and the said statute the de-
ants, John H. Olmsted and William H. Olmsted, became the
imate children of Benjamin F. Olmsted, in the State of Michi-

his involves a conclusion of law and not of fact and therefore
ed. Samuel Greenbaum, J. S. C.)
IV. In June 1883, Benjamin F. Olmsted being a resident of
domiciled in Michigan, his first wife Mary Jane brought an
n in the Supreme Court of this State against him, and other
ndants, in which she asked for a judicial separation from him,
for alimony and counsel fees. Judgment was rendered in her
.
V. The judgment roll in that action contains no evidence of
any service of the summons upon Benjamin F. Olmsted nor
is there a notice of appearance for him, nor was an answer
interposed on his behalf.

XVI. Benjamin F. Olmsted was represented by counsel on a motion in said action to sequestrate his property, made a Special Term, and on an appeal from the order entered on such motion, at General Term.

XVII. Except as above Benjamin F. Olmsted was not represented by counsel in the said action in the New York Supreme Court.

XVIII. The order to sequestrate the property of Benjamin F. Olmsted was affirmed at General Term.

XIX. Mary Jane Olmsted died in New York in 1902, having received alimony from Benjamin to the time of her death.

XX. Sarah Louise Olmsted, the second wife, died in 1900.

XXI. Benjamin F. Olmsted died in 1905.

I find the foregoing facts as requested except the 13th which is refused for the reason indicated in the margin.

SAMUEL GREENBAUM,
Justice of the Supreme Court.

Conclusions of Law.

I. The divorce procured by Benjamin F. Olmsted from Mary Jane Olmsted, in the State of Michigan in 1882, is of no force and effect in New York state.

II. The said divorce is valid in Michigan.

III. The marriage of Benjamin F. Olmsted to Sarah Louise in Michigan, in 1882, was valid in Michigan.

(Unnecessary.)

51 IV. The defendants John H. and William H. Olmsted are the "lawful issue" of Benjamin F. Olmsted, in Michigan.

(Unnecessary.)

V. The defendants John H. Olmsted and William H. Olmsted are not the "lawful issue" of Benjamin Olmsted in New York.

VI. The proceeds of the property now in the hands of the executors, must be distributed by him in accordance with the terms of the first codicil to the last will of Silas Olmsted.

The foregoing conclusions of law, excepting the 3d and 4th for the reason noted in the margin are found.

SAMUEL GREENBAUM,
Justice of the Supreme Court.

Exceptions.

Supreme Court, State of New York.

DANIEL H. OLMSTED, Plaintiff,
against
ELLEN A. OLMSTED et al., Defendants.

Exceptions to finding of fact and conclusions of law, and to refusal to make as requested, certain findings of fact and conclusions of law.

You will please take notice that John H. Olmsted and William H.

Olmsted, defendants in the above entitled action except to the findings of fact and conclusions of law made herein by Hon. Samuel Greenbaum, Justice of the Supreme Court, d July 24th, 1906, and filed in the office of the Clerk of the nty of New York, on August 2nd, 1906, as follows:

They except to the sixth finding of fact insofar as the same s that the said order was "duly affirmed" on the ground that e is no evidence tending to sustain such finding.

. They except to the second conclusion of law insofar as the e sets forth the names of the lawful issue of Benjamin Olmsted.

I. They except to the third conclusion of law, and to each and y part thereof.

. They except to the fourth conclusion of law and to each and y part thereof.

. They also except specifically to the refusal of the court to find several findings of fact and conclusions of law requested by them, refused, in the findings filed in the office of the Clerk of the nty of New York on August 11th, 1906, being defendants' pro- l thirteenth finding of fact, and defendants' proposed third and h conclusion of law.

ated, Aug. 21, 1906.

BYERS & SNYDER,
Attorneys for Defendants John H. and William H. Olmsted, 41 Park Row, Manhattan, New York City, N. Y.

Peter G. Dooling, Clerk of the County of New York; Charles usconb, Attorney for Plaintiff; Seth Bird, Attorney for De- nt Bird; Read G. Dilworth, Attorney for Ellen Olmsted et al.

Plaintiff's Exhibit.

eing printed record on Appeal of Separation Suit by Mary Olmsted against Benjamin F. Olmsted)

Supreme Court.

MARY J. OLMSTED, Plaintiff,
against
AMIN F. OLMSTED, CYRUS OLMSTED, JAMES BIRD and MINARD MILDEBERGER, Defendants.

Summons.

e above named Defendants:

u are hereby summoned to answer the complaint in this action, o serve a copy of your answer on the plaintiff's attorney within days after the service of this summons, exclusive of the day ice, and in case of your failure to appear or answer, judgment

will be taken against you by default, for the relief demanded in the complaint.

Dated June 5th, 1883.

CHARLES S. SPENCER,
Plaintiff's Attorney.

Office address, No. 154 Nassau Street, New York City.

54 Supreme Court, New York County.

Place of Trial.

MARY J. OLMSTED
against
BENJAMIN F. OLMSTED, CYRUS OLMSTED, JAMES BIRD and MINARD D. MILDEBERGER.

The plaintiff in this action respectfully shows to the Court and alleges:

I. That at the town of Monroe, Orange county, New York, the plaintiff and defendant were, on the 25th day of December, 1850, duly and legally married together.

II. That the issue of said marriage is four children, whose names and ages are as follows, to wit: Mary H., thirty-one years of age; Daniel H., twenty-nine years of age; Frank S., twenty-seven years of age; Clarence, seventeen years of age, all of whom were, at the times hereinafter mentioned, under the age of twenty-one years and dependent upon their parents, for their maintenance and support.

III. That on or about the 30th day of June, 1870, at the City of Newburgh, the defendant, Benjamin F. Olmsted, left, deserted and abandoned this plaintiff and their said children, without her consent and without cause, provocation or excuse, and failed, neglected and refused, and from that time to the present has so failed, neglected and refused, and still continues to fail, neglect and refuse to support or in any way provide for the maintenance of this plaintiff and her said children. That during the whole of that time this
55 plaintiff has remained away from and refused to return to this plaintiff and still continues so to do, and because thereof this plaintiff has been forced to pay out large sums of money, which she has been able to earn by her own toil and labor and which her said children have been able to earn for her, amounting to many thousands of dollars, which the defendant has failed and refused, and still fails and refuses to re-pay.

IV. That upon information and belief since the said defendant abandoned the plaintiff he has lived in the State of New Jersey with a woman whom he there pretends to have married, has since abandoned her and is now living with a third in the State of Michigan, whom he there pretends to have married.

V. That since said Abandonment this plaintiff has been and still is entirely dependent upon her own efforts for support, and the

lness and charity of her relatives and friends, and is, and has
entirely without means, and many times in sore need and want.

I. That the defendant has recently inherited large properties,
real and personal, valued in all at upwards of forty thousand
rs, the same being bequeathed and devised to him, by his father,
s Olmsted, late of the county of Westchester, deceased, and con-
ng of a certain lot of land and the improvements thereon, in fee
le, the same being known as 319 Spring Street, in the City of
York, also a life estate in and to a certain lot of land with the
rovements thereon, known as 500 Washington Street, in said
, also one-half share of the proceeds arising from the sale of
ain land known as 328 Spring street, in said city, the sum of
thousand dollars in cash, and one-eighth part of the proceeds
he sale of the property of said Silas Olmsted directed to be sold
in his last will and testament.

VII. That, as this plaintiff is informed and believes, and therefore alleges, the defendant being a non-resident, and out he jurisdiction of this court, and with intent to defraud and at this plaintiff in the enforcement of any decree that might be ted herein against him, has, by a deed recorded in the office of Register of the County of New York transferred and conveyed property to James Bird, of the County of Westchester, and said has contracted with said Olmsted to pay over the same to him is representatives, when he shall have been able to obtain a re- e of dower from the plaintiff.

VIII. This plaintiff further alleges, on information and belief, the said Olmsted has given to a certain lawyer in the State of higan, an irrevocable Power of Attorney, with one-eighth interest im in and to said property, for the purpose of settling with, and aining the same from said Bird, and converting, transferring, con- ing or otherwise disposing of the same, so as to prevent any decree his Court from being enforced.

X. That this plaintiff is informed and believes, that said deed power of attorney have been given wholly without consideration, for the sole purpose of defrauding and defeating this plaintiff the said Olmsted's creditors.

X. That said James Bird, together with Cyrus Olmsted, are the ex- tors of said last will and testament of Silas Olmsted, deceased, and Mildeberger is their agent to collect the rents and profits of said perty, and that they, as such, have the whole thereof in their pos- ion and control.

XI. That said defendant, Benjamin F. Olmsted, is a prodigate, ndthrift, and habitual drunkard, and utterly incompetent to take e of and invest his property, and is of unsound and eccentric mind.

Wherefore the plaintiff demands judgment and relief, as follows:

Adjudging that a decree of separation, forever, be made between s plaintiff and her husband, said defendant, Benjamin F. Olm- d, and that a certain amount be decreed to her, to be paid out of aforementioned estate, for her support and maintenance, and the

support and maintenance of her children, and a sufficient amount to defray the expenses of this action.

Appointing a permanent trustee to take charge of said property, upon giving a good and sufficient bond for the faithful discharge of his duty, who shall pay out the amount decreed to this plaintiff for her support, and the balance of the profits, rentals or income arising therefrom, to her said husband, vacating, setting aside and annulling the deed made by the defendant to said James Bird and annulling and setting aside the power of attorney, mentioned in said complaint.

Enjoining and restraining the defendants, or any of them, from in any way, either actively or permissively, transferring, disposing of, or otherwise interfering with any of the money's or other property herein mentioned.

And such other and further relief as may in the premises be just and proper.

CHARLES S. SPENCER,
Plaintiff's Attorney, 154 *Nassau Street*,
Tribune Building, New York City.

58 CITY AND COUNTY OF NEW YORK, *ss:*

Mary Jane Olmsted, being duly sworn, says she is the plaintiff in this action, that she has heard read the foregoing complaint and knows its contents and that the same are true of her own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters she believes it to be true.

MARY JANE OLMSTED.

Sworn May 31st, 1883, before me,

JOHN HAHNENFELD,
(5) *Notary Public, New York County.*

Supreme Court.

MARY J. OLMSTED
against
BENJAMIN F. OLMSTED, CYRUS OLMSTED, JAMES BIRD, and MINARD D. MILDERBERGER.

The answer of James Bird, one of the above defendants, to the complaint in this action, states:

That he is informed and believes, that the plaintiff and defendant, Benjamin F. Olmsted, were married and that the issue of such marriage were as stated in the complaint.

2. He is also informed that said Benjamin F., at or about the time, in that behalf mentioned in the complaint, abandoned the plaintiff and her children, and has not since lived with or
59 provided for any of them, but whether said Benjamin F. did so without cause, or provocation, this defendant has no knowledge or information sufficient to form a belief.

3. He has no knowledge or information, sufficient to form a belief, to the amount which plaintiff has been compelled to expend for support, as alleged in the complaint.

4. He admits that said Benjamin F. has become the owner of tain real estate, in the city of New York, and entitled to the use l income of certain other real estate, and the interest of the pro- ds of the sale of certain other real estate, by virtue of the will of as Olmsted, deceased, but he denies that the value of the same is y thousand dollars.

5. He is informed and believes, that said Benjamin F. did not ke the deed mentioned in the seventh clause or sub-division of complaint, with intent to defraud plaintiff, or to defeat her, in enforcement of any decree that might be granted against her.

6. A copy of a trust agreement, under which all of said property eld by this defendant, is hereto annexed marked A.

7. He is informed and believes that said Benjamin F. has given power of attorney mentioned in said complaint, but has no wledge or information sufficient to form a belief as to the pur- e for which the same given, except as the same appears on the of said power of attorney.

8. He is sole executor of the last will and testament of Silas Olm- , deceased, but as trustee under the aforesaid deed executed by Benjamin F. to him and a bill of sale of personal property bear- even date therewith, also executed by said Benjamin F. — him, as in his hands, all the real estate to which said Benjamin F. is entitled under the said will of said Silas Olmsted and which is all of the property owned by said Benjamin F., or in which he has any interest, as this defendant Bird is informed and eves.

9. That he has no knowledge or information sufficient to form a ef as to the present habits or mental condition of said Benja- F.

Wherefore, this defendant asks that said complaint may be dis- sed, as to him, with costs and that he may have such other relief he premises as may be proper.

C. FROST,
Att'y for Defendant Bird

Y AND COUNTY OF NEW YORK, *ss:*

ames Bird, being duly sworn, says that he has heard read the going answer and knows the contents thereof and that the same me of own knowledge, except as to the matters therein stated to lleged on information and belief, and as to those matters he be- s it to be true.

JAMES BIRD

sworn to before me this 9th day of July, 1883.

C. R. WATERBURY,
Notary Public, N. Y. Co.

61 "A."

Whereas, the undersigned, Benjamin F. Olmsted, has, by two several instruments in writing, under his hand and seal, and bearing even date herewith granted, sold and transferred to the undersigned, James Bird, all the right, title and interest of him, the said Benjamin F. Olmsted in, and — the real and personal estate of his father, Silas Olmsted, deceased, whether under the will of said Silas Olmsted, and the several codicils thereto or as heir-at-law or next of kin of said Silas Olmsted, deceased, which said instruments are absolute in form thereof. Now, for the purpose of declaring the true intent and meaning thereof, and of creating valid trusts with relation to the property so conveyed and transferred, it is hereby understood and agreed that said Bird will collect and receive all of such personal property and invest the same at interest, on real or personal security, as he shall think proper from time to time, and collect and receive such interest during the lifetime of said Olmsted and pay over the same, after deducting and retaining the fees and commissions of said Bird, and all costs and expenses which he shall pay or incur, in and about the execution of these trusts, and the care and management of such property, to the said Olmsted or such person or persons, as he shall from time to time during his life, in writing direct, and said Bird shall also take charge of all such real estate—make all necessary repairs, improvements, and additions thereupon and thereto, lease and rent the same for such terms as he shall think fit, sell and convey said real estate at such times and at such prices as he may think best for the interest of said Olmsted and invest the proceeds of such real estate, in case of sale at interest upon such surities (*sic*) real or personal as said Bird shall think best for the interest of said Olmsted or said Bird, shall in his discretion, invest the proceeds of such sale in other real estate in the name of

62 said Bird, and the same sell again from time to time and invest the proceeds thereof at interest on such securities as he may think fit and proper, during the life of said Olmsted, and also, pay over all such rents and interest to said Olmsted, or to such persons as he shall in writing direct, during his life, after deducting therefrom all such sums of money, as he (said Bird) shall have paid or become liable for on account of the execution of this trust, and also, deducting his fees and commissions.

And it is further understood and agreed, that said Bird, shall and will pay over, and convey said personal and real estate, which shall remain in his hands or under his control at the death of said Olmsted, to such person or persons, as he, said Olmsted, shall by last will and testament direct, and if he shall fail to make such will, then that said Bird, shall pay over and distribute such personal property, to the next of kin of said Olmsted, other than his wife, and convey such real estate to his heirs-at-law in the same manner and proportions, as such personal estate would be distributed, and such real estate descend under the Statutes of the State of New York.

And the said Bird, does hereby accept the aforesaid trusts, and agree to perform the same according to the true intent and meaning of the same.

it is further agreed, that if the said Olmsted, shall at any his lifetime, and after his wife shall have fully released all nterest in the property and estate of him, said Olmsted, said ll transfer and reconvey all of the property and estate, so a- l transferred to him.

tness whereof, the parties have hereto set their hands and is 5th day of September, 1874.

BENJAMIN F. OLMSTED. [L. S.]
JAMES BIRD. [L. S.]

l and delivered in presence of
FRANKLIN COUCH.

VESTCHESTER COUNTY, *ss:*

is 5th day of September, 1874, before me personally came in F. Olmsted and James Bird, to me known to be the in- s described in, and who executed the foregoing instrument erally acknowledged, that they executed the same for the therein mentioned.

FRANKLIN COUCH,
Notary Public.

ESTER COUNTY,
State of New York, ss:

nes F. D. Crane, Clerk of the County aforesaid, and also the County and Supreme Courts, in and for said County, being Courts of Records, do hereby certify that Franklin Esq., whose name is subscribed to the certificate of acknowl- t of the annexed instrument was, at the date of said Cer- a Notary Public in and for said County, residing in said appointed and sworn and duly authorized to take the same, well acquainted with the handwriting of said Notary Pub- verily believe that the signature to said certificate is genuine, certify that said Instrument is executed and acknowledged g to the laws of the State of New York.

timony, whereof, I have hereunto set my hand and affixed of the said Courts and County, the 25th day of February,

s.] JAMES F. D. CRANE, *Clerk.*

At a Special Term of the Supreme Court, of the State of New York, held at the Court House, in the City of New York, 22nd, 1885.

t: Hon. George C. Barrett, Justice.

MARY J. OLMSTED
against
IN F. OLMSTED, JAMES BIRD, CYRUS OLMSTED, and MINARD D. MILDEBERGER.

Judgment.

ause having been brought on to trial before this Court at a Term thereof, without a jury, and the same having been duly

heard, and the evidence presented by the parties hereto having been duly taken, before this Court, and due consideration and deliberation having been had, and the Court having found in favor of the Plaintiff and against the Defendant in this action, it is now on motion, George R. Phoebus, Plaintiff's Attorney,

Ordered, adjudged and decreed, that the plaintiff and defendant, Benjamin F. Olmsted, be and they hereby are, forever separated from bed and board; and it is also,

Ordered, adjudged and decreed that the said defendant Benjamin F. Olmsted, on the first day of each and every month pay or cause to be paid to the plaintiff, Mary J. Olmsted, the sum of fifty dollars as alimony for her support and maintenance during her natural life; and it is further

Ordered, adjudged and decreed, that the defendant, Benjamin F. Olmsted, file within twenty days from the entry of this judgment, a bond with two good and sufficient sureties (*sic*) to be duly approved by the Court, for the true and faithful performance of the terms of this judgment, and it is further,

65 Ordered, adjudged and decreed that the defendant, James Bird, upon service of a certified copy of the judgment upon him, pay out of the funds in his hands, as trustee of the defendant, Benjamin F. Olmsted, to George R. Phoebus, plaintiff's attorney, the sum of four hundred and twelve and 87-100 dollars, as his costs and counsel fee herein, and also that said Bird, pay out of the aforementioned funds, upon service upon him of a certified copy of the judgment, the plaintiff, Mary J. Olmsted, or her said attorney, the sum of four hundred and fifty dollars as alimony, at the rate of twenty-five dollars per month during the pendency of this action.

(Endorsed, filed January 27th, 1885.)

[L. S.] PATRICK KEENAN, *Clerk.*

(A Copy.)

Supreme Court, State of New York.

MARY J. OLMSTED
against
BENJAMIN F. OLMSTED.

Please take notice, that on the annexed affidavit and on the judgment heretofore entered and on all the papers herein, I shall move before one of the Justices of this Court at a Special Term thereof to be held at Chambers at the County Court House, in the City of New York, on the 6th day of April, 1885, at 11 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order sequestrating the personal property, and the rents and profits of the

66 real property of the said defendant, and for another appointing a Receiver of the same, and for such other and further relief as may be equitable and just.

Dated, New York, March 23rd, 1885.

GEORGE R. PHOEBUS,
Plaintiff's Attorney.

To Andrew Blake, Esq., Attorney for Defendant, B. F. Olmsted and C. Frost, Esq., Attorney for Defendant, James Bird.

New York Supreme Court.

MARY J. OLMSTED
against
BENJAMIN F. OLMSTED and Others

CITY AND COUNTY OF NEW YORK, *ss.:*

George R. Phoebus, being duly sworn, says: I am the plaintiff's attorney in the above entitled action.

That this action *in* is brought by the plaintiff against the defendant, Benjamin F. Olmsted, for a limited divorce and judgment of separation.

This action was tried at the January term of this Court before Hon. Justice Barrett.

Judgment was entered in favor of the plaintiff and against the defendant, on or about the 22nd day of January, 1885.

By the terms of said judgment the defendant was ordered and required to pay to the plaintiff or her attorney on the first day of each and every month the sum of fifty dollars and to file within twenty days a good and sufficient bond for the faithful performance of the terms of said judgment.

The time of the defendant to file said bond was on the 21st day of February, extended ten days by consent of defendant. Said bond has not been filed and the defendant has wholly failed to provide for the future payment of the said moneys, although the time in which to file said bond has long since passed.

I ask for an order sequestrating the personal property and the rents and profits of the real property of said defendant, laws and statutes in such case made and provided.

No previous application has been made.

GEORGE R. PHOEBUS.

Sworn to before me, this 23rd day of March, 1885.

C. R. WATERBURY,
Notary Public, New York County (126).

Supreme Court.

MARY J. OLMSTED
against
BENJAMIN OLMSTED and Others

WESTCHESTER COUNTY, *ss.:*

James Bird, being duly sworn, says he is one of the defendants in this action, which was brought for the purpose of procuring a judgment for a legal separation between the plaintiff and the defendant, Benjamin F. Olmsted, who are husband and wife, for alimony; that such proceedings have been had herein, that a judgment has-

been rendered adjudging such separation, and an allowance to plaintiff by way of alimony to be paid by defendant Olmsted to the amount of fifty dollars per month, together with the costs of
68 this action and allowance therein; that since the rendition of such judgment, which was on or about the month of January last, as near as deponent can remember, he has paid to the attorney for the plaintiff as follows: On or about January 29th, 1885, the sum of $862.17, and on March 15th, 1885, the sum of $100, both on account of the amounts in judgment to be paid to the plaintiff in this action.

That deponent has paid all the moneys which have been demanded of him on account of the judgment in this action. And deponent further says that on or about the 5th day of September, 1874, the defendant, B. F. Olmsted, executed to him a transfer of the personal property of him, the said B. F. Olmsted, by a written instrument under his hand and seal, of which the annexed marked "A" is a copy, and did on the same day execute to deponent a deed bearing date on that day, whereby said Olmsted conveyed to deponent all of the real estate which was devised to said Olmsted by the will of his father, Silas Olmsted, and which is the same real estate described in the complaint in this action, and all which said Olmsted owned in the State of New York or now owns, as deponent is informed and believes, that deponent is well acquainted with the financial condition of said Olmsted; which deed is recorded in the offices of the registers of New York and Westchester counties; that the personal property so transferred to deponent as aforesaid is all the personal property owned by him in this state or elsewhere, as deponent is informed and believes. And the deponent further says that at the time of the execution by Olmsted of the aforesaid deed of his real estate and transfer of his personal property and as part of the same transaction, said Olmsted and deponent made and entered into an agreement declaring the purposes and trusts upon which such deed and transfer were made, a copy of which is annexed marked "B."

69 And deponent further says that ever since the execution of said last mentioned instruments in writing, deponent has received the rents and profits of the said real estate and interests of said personal property, except where such property was in the hands of a receiver, who was appointed in an action for partition brought for the sale or division of the property and real estate of said Silas Olmsted; that he now has in his hands all of such personal property safely invested. And deponent further says that he has no interest in this action and none in said moneys or property, except in his capacity as such trustee.

JAMES BIRD.

Sworn to before me, this 10th day of April, 1885.

C. W. HORTON,
Notary Public.

a Special Term of the Supreme Court, of the State of New York, at the Court House, in the City of New York, April 15th, 1885 esent: Hon. George C. Barrett, *Justice*.

MARY J. OLMSTED
against
BENJAMIN F. OLMSTED.

motion having heretofore been made upon the affidavit of ge R. Phoebus, plaintiff's attorney, and upon due notice to all parties who have appeared in this action and the same having on duly to be heard. Now, on reading and filing the said affidavit and notice of motion and after hearing George R. Phoebus, plaintiff's attorney, in support of said motion, and Andrew Blake, attorney for defendant, Benjamin F. Olmsted, Calvin Frost, attorney for defendant, James Bird, in opposition to, and on reading and filing the affidavit of defendant, James and due deliberation and consideration having been had. Now, notion of George R. Phoebus, plaintiff's attorney, it is,

dered, that a sequestration of all the personal property and ents and profits of the real property of the defendant, Benjamin Olmsted, be and the same hereby is *hereby* made, and that od Mildeberger, be and hereby is appointed the Receiver thereof, the usual powers, authority and liability of a Receiver in like , and especially for the purpose of paying from time to time, r the direction of this court, out of the property so sequestrated, sum or sums of money provided to be paid by the judgment ofore entered in this action to the plaintiff, Mary J. Olmsted, it: The sum of fifty dollars on the first day of each and every th during the lifetime of the defendant, Benjamin F. Olm- and such other sum or sums of money as the ends of justice require, and the said Receiver is hereby authorized and empow- to demand and receive from any party who may be in posses- thereof, any and all sums of money or other personal property nging to the defendant, Benjamin F. Olmsted, or which the said ndant may be entitled to receive; and also all rents, issues and ts arising from the real estate of said Benjamin F. Olmsted, property known as 319 Spring Street, in the City of New York, erty known as 500 Washington Street in said city, and prop- known as 328 Spring Street, in said city, and any other property e said defendant; and to collect and receive from the defendant, s Bird, all the personal property of the defendant, Benjamin F. sted, now *into* his possession, or which may hereafter come into his possession; and it is further

Ordered, that the said James Bird, upon demand on him by said Receiver, be and he hereby is ordered to transfer, ey, pay over and deliver to the said Receiver, any and all sums money, securities or other personal property in his hands, or r his authority and control, belonging to the defendant, Benja- F. Olmsted, or to which the said Benjamin F. Olmsted may be led, and which the said Bird now claims to hold under and by

virtue of a certain conveyance and trust agreement, executed by and between the said defendant and Benjamin F. Olmsted sometime prior hereto; also,

Ordered, that the said Receiver shall, before entering upon the discharge of his duties as such Receiver, execute and file with the Clerk of this Court, a proper bond, with two good and sufficient sureties, to be duly approved by one of the Justices of this Court the penalty of which said bond shall be in the sum of ten thousand dollars, the condition of which bond shall be the good and faithful performance of his duties as such Receiver; also,

Ordered, that the plaintiff recover Ten Dollars costs of this motion.

72 Supreme Court.

MARY J. OLMSTED
against
BENJAMIN F. OLMSTED and Others.

SIR: Please to take notice that the defendant, Jas. Bird, appeals to the General Term of this Court, from an order of this court made at Special Term, on the 15th day of April, 1885, and entered in the office of the Clerk of the City of New York on the 17th day of April, 1885, and from every part thereof.

Dated, May 4th, 1885.

Yours, &c.,

C. FROST,
Att'y for Defendant James Bird.

Office and P. O. Address, Peekskill, N. Y.

To Patrick Keenan, Esq., County Clerk; George R. Phoebus Esq., Att'y for plaintiff, Mary J. Olmsted; Andrew Blake, Esq., Att'y for defendant, Benjamin F. Olmsted.

73 *Defendant John H. Olmsted's Exhibit.*

(Being exemplified record of divorce proceedings in Michigan, Benjamin F. Olmsted, plaintiff, Mary J. Olmsted, defendant.)

STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne, in Chancery.

To the Circuit Court for the County of Wayne in Chancery:

Humbly complaining, showeth unto the court here, your orator Benj. Franklin Olmsted, that he is now, and has been for more than a year now last past, a resident of said state, and is now a resident of said County. Your Orator further shows, that on or about the 24th day of December, A. D. 1848, at Township Monroe County of Orange, New York, your orator was duly and legally married to the Defendant herein, one Mary Jane Olmsted, by Morgan Stuart, Justice of the Peace, and that the name of said defendant, previous to

said marriage was Mary Jane Hollett. And your orator further shows that he has been informed, and verily believes, and therefore charges the truth to be, that this defendant, disregarding the solemnity of the marriage vow, hath since said marriage, to wit: on the day of from 1860 until 1870 this defendant was guilty of extreme cruelty towards your orator by refusing to live with him, or cohabit with him, and by forcibly ejecting him from his domicile occupied by him and the defendant, and by refusing him permission to re-enter and live in said house with the said defendant and their children. Your orator further alleges that for more than two years last past said defendant has wholly deserted and abandoned your orator without any just cause whatsoever, and has also continued to desert and abandon him and still does so, and that for 12 years last past she refuses to live with him, but has wholly deserted him and still continues to do so. Your orator further shows, that

74 there are now living four children the sole off-springs of said marriage, whose names and ages are as follows, to wit: Mary, aged about 23 years, Daniel, aged about 21 years, Frank, aged about 19 years, Clarence, aged about 13 years.

And your orator positively avers that the several acts of cruelty and desertion hereinbefore charged were all committed without the consent connivance, privity or procurement of your orator, and that he has not voluntarily cohabited with this defendant, since A. D. 1870, and that all of said acts were committed without the consent, connivance, privity, or procurement of your orator, and that this bill is not founded on, or exhibited in consequence of any collusion agreement or understanding whatever, between the parties hereto, or between your orator or any other person, and that he has never been guilty of any act hereinbefore charged against this defendant.

In consideration whereof, and to the end, therefore, that the said Mary Jane Olmsted the defendant hereinbefore named, may without oath her answer on oath being hereby expressly waived, but according to the best and utmost of her knowledge, remembrance, information and belief, full, true, direct and perfect answers make, to all and singular the matters hereinbefore stated and charged, as fully and particularly, sentence by sentence, and paragraph by paragraph, as if the same was here again repeated, and she thereto particularly interrogated, and that the marriage between your orator and the said Mary Jane Olmsted this defendant, may be dissolved, and a divorce from the bonds of matrimony decreed according to the statute in such case made and provided, and that your — may have the care custody control and education of said infant children, Mary, Daniel, Frank and Clarence, the surviving issue of said marriage, and that your orator may have such other relief, and such further relief, in the premises, as shall be agreeable to equity and good conscience,

75 May it please the Court, the premises being considered, to grant unto your orator the peoples' writ of subpena to be issued out of and under the seal of this Honorable Court, to be directed to the said Mary Jane Olmsted this defendant, therein and hereby commanding her on a certain day, and under a certain

penalty, to be therein inserted, personally to be and appear before this Honorable Court, then and there to answer all and singular the matters and things hereinbefore set forth, and to stand to, abide by and perform such order and decree herein, as shall be agreeable to equity and good conscience, and your — will ever pray, etc.

BENJAMIN FRANKLIN OLMSTEAD.

SYLVESTER LARNED,
Solicitor and of Counsel of Complainant.

STATE OF MICHIGAN,
County of Wayne, ss:

On this Eighteenth day of January, A. D. 1882, before me personally came the above named Benjamin Franklin Olmstead, who being duly sworn says, that he has heard read the foregoing bill of Complaint by him subscribed, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on information or belief, and as to those matters he believes to be true.

F. M. McMOTH,
Notary Public, Wayne County, Michigan.

76 STATE OF MICHIGAN:

The Circuit — of the County of Wayne. In Chancery.

In the Name of the People of the State of Michigan.

To Mary Jane Olmstead, Greeting:

Subpœna.

You are hereby notified that a bill of complaint has been filed against you in the Circuit Court for the County of Wayne, in chancery, by Benjamin Franklin Olmstead, as complainant, and that if you desire to defend the same you are required to have your appearance entered with the register of said Court at his office, in the City of Detroit, in person or by solicitor, within twenty days after the 20th day of February, in the year 1882, which is the return day of this writ. Hereof fail not under the penalty of having said bill taken as confessed against you.

Witness, The Honorable Fitzwilliam H. Chambers, Circuit Judge for the County of Wayne, at the Court room of said court, at the city of Detroit, the 10th day of February, in the year of our Lord one thousand eight hundred and eighty-two.

ROBERT A. LIGGETT, *Register.*
By WALTER S. HARSHA,
Deputy Register.

SYLVESTER LARNED,
Solicitor for Complainant.

Underwriting; a personal decree is sought against the defendant Mary Jane Olmstead and the bill is filed to reach interests in property, and not to obtain any further relief against the remainder of the defendants.

SYLVESTER LARNED,
Solicitor for Complainant.

77 STATE OF MICHIGAN,
County of Wayne, ss:

Francis M. McMath, being duly sworn, deposes and says that he has made diligent search for the within named defendant and is informed and verily believes that said defendant is not a resident of said county or state and cannot be found therein.

F. M. McMATH.

Sworn to and subscribed before me this 13th day of February, 1882.

E. J. McKENDREE,
Notary Public, Wayne County, Michigan.

The Circuit Court for the County of Wayne. In Chancery.

BENJ. F. OLMSTEAD, Complainant,
vs.
MARY JANE OLMSTEAD, Defendant.

STATE OF MICHIGAN,
County of Wayne, ss:

Francis M. McMath, clerk in the office of Sylvester Larned, Esq., being duly sworn, deposes and says that Sylvester Larned, Esq., is solicitor for complainant in the above entitled cause, and that he makes this affidavit for and on behalf of said solicitor; that the defendant herein, Mary Jane Olmstead, is not a resident of said
78 county or state; but is a resident of the state of New York and is now in said state; that the subpœna issued herein has been returned "not found."

F. M. McMATH.

Subscribed and sworn to before me this 14th day of February, 1882.

E. J. McKENDREE,
Notary Public, Wayne County, Michigan.

STATE OF MICHIGAN,
County of Wayne, ss:

Charles Moore, being duly sworn, deposes and says, the annexed printed copy of a notice was taken from The Detroit Every Saturday, a newspaper printed and circulated in said County, and that the said notice was published in said newspaper on the 18th and 25th days of February, the 4th, 11th, 18th, and 25th days of March and

the 1st day of April, A. D. 1882, and that he is one of the publishers of said newspaper, and knows well the facts stated herein.

CHARLES MOORE.

Subscribed and sworn to before me, this eighth day of May, A. D. 1882.

FRANK D. ANDRUS,
Notary Public in and for said County.

79 STATE OF MICHIGAN:

At a session of the Circuit Court for Wayne County, In Chancery, held at the Circuit Court Room in the City of Detroit, on the 14th day of February, 1882.

Present: Hon. John J. Speed, Circuit Judge.

BENJAMIN F. OLMSTEAD
vs.
MARY JANE OLMSTEAD.

It satisfactorily appearing to the court that the defendant is not a resident of said state, but resides in the state of New York, on motion of Sylvester Larned, Esq., solicitor for complainant, it is ordered that said defendant appear and answer the bill of complaint filed herein within four months from the date hereof. In default whereof said bill shall be taken as confessed. And it is further ordered that within twenty days from this date a notice of this order shall be published in The Detroit Every Saturday, a newspaper printed, published and circulated in said County, and continued once in each week for six successive weeks thereafter.

JOHN J. SPEED,
Circuit Judge.

SYLVESTER LARNED,
Complainant's Solicitor.

A true Copy:
JAS. B. ORMISTON,
Deputy Register.

Printer's Bill:
2 folios 7 times $5,60.

80 The Circuit Court for the County of Wayne. In Chancery.

BENJ. FRANK OLMSTEAD, Complainant,
vs.
MARY JANE OLMSTEAD, Defendant.

COUNTY OF WAYNE,
State of Michigan, ss:

Sylvester Larned, solicitor for the complainant in the above entitled cause, being duly sworn, doth depose and say, that the said

bill of complaint was filed with the register of this court, on the 9th day of February, 1882, by the above named complainant against the above named defendant, to dissolve the marriage between them, because of the extreme cruelty of defendant to said complainant and of the desertion of said defendant from said complainant without cause for more than two years next preceeding the filing of the bill in this cause. That said defendant is a non-resident of said State and County; and that her present residence is unknown; that an order was heretofore entered by this court requiring the defendant to appear and answer the said bill of complaint and the same was duly published pursuant to the statute; that more than four months have now elapsed since the first publication of said order, as duly appears from the affidavit of publication now filed in this court, and that no appearance has been entered for defendant in said cause; that the complainant herein is a necessary witness and also a material witness in his own behalf and that said com-
81 plainant without his own testimony cannot fully establish the facts alleged in said complaint and cannot safely proceed to the hearing thereof, and that all the proceedings to take said bill as confessed have been regular and according to the rules of practice of this Court.

SYLVESTER LARNED.

Sworn to and subscribed before me, this 15th day of June, 1882.

PETER E. PARK,
Notary Public, Wayne County, Michigan.

In the Circuit Court for the County of Wayne. In Chancery.

BENJ. F. OLMSTEAD, Complainant,
vs.
MARY JANE OLMSTEAD, Defendant.

On filing due proof of publication of the order made by this Court requiring said defendant to appear and answer the bill of complaint herein and on filing affidavit of regularity and more than four months having elapsed since the first publication of said order and said defendant Mary Jane Olmstead not having appeared; and on reading and filing the affidavit of Sylvester Larned, Esq., solicitor for said complainant, showing all the proceedings to take the bill of complaint as confessed, against said defendant, have been regular and according to the rules of practice of this Court, on motion of
Sylvester Larned, Esq., solicitor for the complainant, it is
82 ordered that the bill of complaint filed in this cause be, and the same hereby is taken as confessed by the said defendant, Mary Jane Olmstead and that proof of the facts and circumstances stated in said bill may be taken in open court. And it is also ordered that the complainant Benjamin Franklin Olmstead be sworn in said cause and give evidence in his own behalf before the court now here.

SYLVESTER LARNED,
Solicitor for Complainant.

STATE OF MICHIGAN:

The Circuit Court for the County of Wayne. In Chancery.

No. 7087.

BENJ. F. OLMSTEAD, Complainant,
vs.
MARY JANE OLMSTEAD, Defendant.

At a session of said court, held at the Circuit Court Room in the City of Detroit, in said County, on the 19th day of June, in the year one thousand eight hundred and eighty-two.

Present: Hon. F. H. Chambers, Circuit Judge.

This cause having been brought on to be heard upon the bill of complaint filed therein, taken as confessed by the defendant, and upon the hearing of witnesses in open court by an order heretofore entered therein, to take proofs of the material facts charged in such bill of complaint; thereupon, on reading the bill of
83 complaint, and hearing the testimony and proofs accompanying the same from which it satisfactorily appears to this court, that the material facts charged in such bill of complaint are true, and that the defendant Mary Jane Olmstead has been guilty of the several acts of cruelty and desertion therein charged; on motion of Sylvester Larned, Esquire, of counsel for said complainant, it is ordered, adjudged and decreed, and this court, by virtue of the authority therein vested, and in pursuance of the statute in such case made and provided, doth order, adjudge and decree, that the marriage between the said complainant, Benjamin F. Olmstead and the said defendant Mary Jane Olmstead, be dissolved, and the same is hereby dissolved, accordingly, and a divorce from the bonds of matrimony between said parties is, also, adjudged and decreed.

F. H. CHAMBERS,
Circuit Judge.

Countersigned.
ALBERT HOSMER, *Dp'y Reg.*

84 STATE OF MICHIGAN:

At a session of the Circuit Court for Wayne County, In Chancery, held at the Circuit Court Room in the City of Detroit, on the 11th day of February, 1882.

Present: Hon. John J. Speed, Circuit Judge.

BENJAMIN F. OLMSTEAD
vs.
MARY JANE OLMSTEAD.

It satisfactorily appearing to the Court that the defendant is not a resident of said state but resides in the State of New York, on motion of Sylvester Larned, Esq., solicitor for complainant, it is or-

dered that said defendant appear and answer the bill of complaint filed herein within four months from date hereof. In default whereof said bill shall be taken as confessed. And it is further ordered that within twenty days from this date a copy of this order shall be published in "Every Saturday" a newspaper printed, published and circulating in said county and continue once in each week for six successive weeks thereafter.

JOHN J. SPEED,
Circuit Judge.

SYLVESTER LARNED,
Solicitor for Complainant.

Authentication of Record.

Circuit Court for Said County.

STATE OF MICHIGAN,
County of Wayne, ss.

I, Louis W. Himes, Clerk of said Court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and seal of said Court, this 5th day of December, 1905.

[SEAL.] LOUIS W. HIMES, *Clerk,*
By WARREN J. OLDFIELD,
Deputy Clerk.

I, Flavius L. Brooke, Presiding Judge of said Court, do certify the foregoing attestation by Louis W. Himes, Clerk of the said Court, to be in due form.

Witness my hand and seal this fifth day of December, 1905.

[SEAL.] FLAVIUS L. BROOKE,
Presiding Judge.

I, Louis W. Hymes, Clerk of said Court, hereby certify that the Honorable Flavius L. Brooke, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, Presiding Judge of said Court, duly commissioned and qualified.

Witness my hand and the seal of said Court, this 5th day of December, 1905.

[SEAL.] LOUIS W. HIMES, *Clerk,*
By WARREN J. OLDFIELD,
Deputy Clerk.

86 *Opinion of Mr. Justice Greenbaum at Special Term.*

OLMSTED
v.
OLMSTED ET AL.

Under the will of Silas Olmsted, late of Tarrytown, Westchester County, New York, one-half of the real property of which he died seized and possessed in this State is devised to the "lawful issue" of his son, Benjamin F. Olmsted, who died in July, 1905. The question to be determined is whether certain two of the defendants are the "lawful issue" of said Benjamin F. Olmsted. It appears that Benjamin F. Olmsted, being a resident of New York in 1850, married Mary Jane Olmsted, with whom he lived until June, 1870, when he deserted and abandoned her and took up his abode in New Jersey. The plaintiff and three of the defendants were the only issue of his marriage. In 1874 Benjamin went through the form of a ceremonial marriage in New Jersey with one Sarah Louise Welchman, who lived with him as though his wife until her death in 1900. Two children (defendants in this action) were born to them in New Jersey. In 1881, Benjamin, Sarah and their two children, became permanently domiciled in Michigan. In 1882 Benjamin brought an action in the Circuit Court of Michigan against Mary Jane, his wife, upon the grounds of desertion and cruelty, the service being by publication, and upon her default a decree in favor of Benjamin, dissolving his marriage, was obtained. Thereafter, on August 22, 1882, Benjamin and Sarah Louise went through a second ceremonial marriage in Michigan. At that time, by a statute then and still in force in Michigan, the children of parents born out of wedlock become legitimate when the parents intermarry. In June, 1883, Benjamin, being a resident of Michigan, Mary Jane commenced an action in the Supreme Court in this State against him for separation. A judgment-roll filed in the separation suit shows that Benjamin was represented by his attorney in a motion for the sequestration of his property to
87 secure the payment of alimony, and on the 22d day of January, 1885, judgment was entered separating from bed and board Mary Jane and Benjamin F., and requiring him to pay certain moneys by way of alimony and counsel fees. Upon an appeal by Benjamin F., to the then General Term of the court from the order entered in the separation action, the order was affirmed. There are certain legal propositions applicable to the questions under discussion which may, up to the present writing, be deemed settled in this State and in the Federal courts. The Michigan decree was and is entitled to no recognition in this State (Haddock v. Haddock, U. S. Supreme Court, N. Y. Law Journal, April 27, 1905). Besides, the decree in separation in this State between Benjamin and Mary Jane is an adjudication of the invalidity in this State of the Michigan judgment. It may also be assumed to be the law that the State of Michigan could and can lawfully give effect within its own territory to the decree of divorce rendered in its court in favor of Benjamin

ddock v. Haddock, supra; Maynard v. Hill, 125 U. S., 190). ...en, the Michigan decree is at least valid in Michigan, the sub- ...ent marriage of Benjamin and Sarah Louise was also valid in ... State, and it must follow that under the statutes of the State to ...h reference has already been made, the children of Benjamin ... Sarah Louise born before the marriage, became legitimized in ...igan after the marriage there of their parents. Another general ...osition of law which has been recognized in this State is that ...tatus of off-spring as to legitimacy or illegitimacy depends upon ...aw of the place of the marriage of the parents. In the language ...tory in his Conflict of Laws (sec. 93), "if by the law of the place ...e marriage the off-spring, although born before marriage would ...egitimate, they ought to be deemed legitimate in every other ...try for all purposes whatever, including heirship of unmovable ...erty." The Court of Appeals, in Miller v. Miller (91 N. Y., pp. 320-321), has expressly referred to and recognized the correctness of this doctrine. We are thus confronted with apparently irreconcilable legal principles in passing upon question before us. Issue can be lawful only when they are the ...ring of persons lawfully married, whether the marriage be con- ...nated before or after the birth of the issue. Within the State ...ichigan the marriage of Benjamin and Sarah Louise is deemed ...il, and hence their issue under the laws of the State, whether ... before or after the marriage of their parents in Michigan, are ...ed legitimate, that is, lawful. Under the law of this State a ...n legitimized in the place of his domicile is legitimate every- ...re, "and entitled to all the rights flowing from the status, in- ...ing the right to inherit" (Miller v. Miller, supra, p. 321). But ...law of this State not only regards the Michigan marriage of ...amin absolutely void, but by a solemn decree made in a cause ...ding between him and his wife, Mary Jane the courts of this ... have judicially declared that his New York marriage with Mary ... was in full force and effect, notwithstanding the Michigan ...e of divorce, a determination recently recogniz...as sound by United States Supreme Court in the Haddock case. As the ...imacy of the said two defendants in this case depends upon the ...ulness of the marriage of their parents, and as this court has ...essly declared that the parents had never been lawfully married, this court now stultify itself and its decrees by recognizing the ...imacy of children who are the off-spring of an illicit relationship? ...examination of the case of Miller v. Miller and the authorities ... which it relies, will show that the question of the status of one ...imatized by the law of his domicile, arise out of facts in that ... which presented no conflict with any decree of a court of this ... affecting the persons concerned or their parents. The test of ...imacy enunciated by the courts of this State and in some other ...dictions would appear to be, generally speaking, a wise and just one. But it is not one that is absolute and unyielding in its ...application. A sound public policy dictates that the courts of this State shall ordinarily recognize the status of one whose ...imacy has been fixed. But where such recognition necessarily ...lves the recognition of the validity of the marriage of the parents

of the person concerned, which our courts have expressly considered and refused to recognize, then it would seem that a conflict between the two jurisdictions is reconcilable only by a higher public policy which demands obedience and respect to laws and mandates of our jurisdiction and requires us to uphold and enforce our own decrees. In Miller v. Miller (supra, at p. 319) the court, in discussing the injustice that might be produced in not observing the status of a child elsewhere legitimized, says: "While the power of the Legislature is paramount unless restricted by constitutional authority it should not be upheld where its effect may be to produce great wrongs, unless imperatively demanded." Story, in his "Conflict of Laws" (8th ed.), at section 106 of chapter IV, which is largely devoted to a discussion of the question now considered, and relied on in the Miller case (supra), says: "No nation being under any obligation to yield up its own laws in regard to its own subjects to the laws of another nation, it will not suffer its own subjects to evade the operation of its own fundamental policy or laws, or to commit frauds in violation of them by any acts or contracts made with that design in a foreign country, as it will judge for itself how far it will adopt and how far it will reject any such acts or contracts. * * * Hence, too, a person born before wedlock, who, in the country of his birth, is deemed illegitimate, may not, by a subsequent marriage of his parents in another country by whose laws such a marriage would make him legitimate, cease to be legitimate in the country of his birth * * * In short, every nation in these and like cases will govern itself by such rules and principles as are best adapted in its own judgment to subserve its own substantial interests and fixed policy and uphold its own institutions." It seems to me that the
90 situation here disclosed is one that imperatively demands that our courts refuse to recognize the status of children acquired in defiance of the laws of our State and the decrees of our tribunals. I am not unmindful of the opinion written in the Matter of Hall (61 App. Div., 265, 278), in which, in discussing the question of the legitimacy of an individual, it is in effect stated that the status of the parents was not involved in considering that of their son, and that "there can be no question of public policy which would preclude one recognizing the legitimacy of this child in Dakota * * * But, more than that, to whatever extent public policy may lead the courts of this State to question in this State the relations of Alice Maude to Richmond Kingman, the father of the infant, that public policy has never led the courts of our own State to a denial of the status of legitimacy to the issue of the marriage when legitimate where born. In this the humanity of our law which will protect the innocent from the wrongs of others outweighs any possible claim of public policy to the contrary, and for the protection of the child the court should not hesitate to apply the general rule that his legitimacy in Dakota determines his legitimacy here." It may be observed that in the Hall case the remarks above quoted are obiter dicta, as it appears that the courts held that the first alleged marriage of the mother, Alice Maude, was not a legal marriage and hence the second marriage, which was the one attacked, was valid. Moreover, in that case there was no previous decree in this State affecting any of the

parties or their parents. As I am, therefore, not obliged to follow the views expressed as above set forth by the learned court in the Hall case, I deem it pertinent to observe that I cannot acquiesce in the opinion that the status of the child may be considered independently and separately from that of the parents. The relation of parents and child, so far as the question of the legitimacy of the child is concerned, are so indissolubly bound
91 up that it seems to me the marital status of the parents inevitably must determine the legitimacy of their offspring. The humanity of the laws of most civilized communities recognizes the propriety of legitimizing offspring born out of wedlock when the parents have married, but I have not learned of any law of any modern civilized nation which legitimizes children of unmarried parents. Nor can I approve of the remarks of the learned court in the Hall case that the "humanity of our law which will protect the innocent from the wrongs of others outweighs any public policy to the contrary," so far as they apply to the question of the legitimacy of offspring. If our humanity "will protect the innocent from the wrongs of others," why are not all bastards deemed legitimate? Upon that doctrine the marriage or marriages of a married man to a woman who innocently believes him to be unmarried should be upheld as lawful. If such reasoning be sound, then would the question of illegitimacy cease to vex the courts. If the marriage institution is to be upheld in its integrity in obedience to the law and policy of this State, the unfortunate consequences of innocent offspring cannot be avoided. My opinion is that the children of Benjamin F. Olmsted and Sarah Louise Welchman are not his "lawful issue." A decree accordingly will follow.

Stipulation Settling Case.

It is hereby stipulated that the foregoing case contains all the evidence given upon the trial of this action and that the same be settled and order to be filed and annexed to the judgment roll herein.

Dated, New York, October —, 1906.

BYERS & SNYDER,
Attorneys for Defendants, John H., and William H. Olmsted.
CHARLES H. LUSCOMB,
Attorney for Plaintiff.
READ G. DILWORTH,
Attorney for Ellen Olmstead, et al.

92 *Order Settling Case.*

On the above stipulation the foregoing case on appeal, containing all the evidence, is hereby settled and ordered on file.

Dated, New York, October —, 1906.

SAMUEL GREENBAUM, *J. S. C.*

Stipulation Waiving Certification.

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal, the judgment roll, and case and exceptions as settled, and the whole thereof, now on file in the office of the Clerk of the County of New York; and certification thereof by the Clerk, pursuant to Section 1353, is hereby waived.

Dated, New York, October —, 1906.

BYERS & SNYDER,
Attorneys for Defendants, John H., and William H. Olmsted.
CHARLES H. LUSCOMB,
Attorney for Plaintiff.
READ G. DILWORTH,
Attorney for Ellen Olmsted et al.

93 *Order Filing Record in Appellate Division.*

Pursuant to Section 1353 of the Code of Civil Procedure, it is Ordered, that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court in the First Judicial Department.

Dated, New York, October —, 1906.

SAMUEL GREENBAUM, *J. S. C.*

Order of Affirmance and Modification.

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department, in the County of New York, on the 8th day of March, 1907.

Present: Hon. Edward Patterson, Presiding Justice; Hon. George L. Ingraham, Hon. Frank C. Laughlin, Hon. John Proctor Clarke, Hon. Francis M. Scott, Justices.

DANIEL H. OLMSTED, Plaintiff-Respondent,
against
ELLEN A. OLMSTED, et al., Defendants; JOHN H. OLMSTED and WILLIAM H. OLMSTED,

The defendants John H. Olmsted and William H. Olmsted having appealed to the Appellate Division of the Supreme Court,
94 First Judicial Department, from the judgment filed herein on August 2nd, 1905, in the office of the Clerk of the County of New York directing the distribution of the proceeds of the real property described in the complaint in this action; and said appeal having been heard at the December, 1906, Term of the Appellate Division of the Supreme Court, and after hearing Mortimer W. Byers, of counsel for the Appellant, and Charles H. Luscomb, at-

y for the plaintiff-respondent, and due deliberation having been

w, on motion of Byers & Snyder, attorneys for the defendants-
llants, it is

dered, That the judgment or decree filed in this action in the
of the Clerk of the County of New York on the 2nd day of
st, 1906, is hereby modified by providing that the Appellants
H. Olmsted and William H. Olmsted are the legitimate chil-
and lawful issue of Benjamin F. Olmsted, deceased, and each is
led to share equally with his other children in the proceeds of the
property described in the complaint; and the said decree is
er modified by awarding costs to the said Appellants in the
t below. And, as so modified, the said decree is affirmed with
of this appeal to the Appellants.

ter.

E. P., *J. S. C.*

Decree.

w York Supreme Court, City of and County of New York.

DANIEL H. OLMSTED, Plaintiff,
against
N A. OLMSTED, Wife of Daniel H. Olmsted; MARY O. DECKER,
ank S. Olmsted, Clarence E. Olmsted and Estelle, His Wife;
ancis A. Reynolds and Delos Reynolds, her husband; Edwin
nsted, Frederick D. Olmsted and Ruth, His Wife; John H.
nsted and Amelia, His Wife; William H. Olmsted and Grace,
s Wife; and James Bird, as Executor under the Will of Silas
nsted, deceased, Defendants.

appeal having been taken from the judgment entered herein
office of the Clerk of the County of New York on August 2nd,
to the Appellate Division of the Supreme Court, First Depart-
, and said appeal having been heard at the December, 1906,
of the said Appellate Division of the Supreme Court, and a
ion having been rendered and an order made by said Court upon
appeal, dated March 8th, 1907, and entered and filed in the
of the Clerk of said Appellate Division on March 18th, 1907,
ing that said judgment or decree be modified by providing
the appellants John H. Olmsted and William H. Olmsted are
the legitimate children and lawful issue of Benjamin F.
Olmsted, deceased, and each is entitled to share equally with
his other children in the proceeds of the real property de-
d in the complaint, and by awarding costs to the appellants in
Court below; and, as so modified, the said judgment or decree
g been affirmed with costs of the appeal to the appellants,
certified copy of said order with the original case upon which
appeal was heard having been transmitted to the Clerk of the
ty of New York and filed in his office on the 20th day of
h, 1907; and the costs of the said Appellants in the Court be-

low and in the Appellate Division having been duly taxed and adjusted at the sum of two hundred eighty-two and 05/100 dollars ($282.05),

Now, upon said order of the Appellate Division and the case upon which said appeal was heard, and on motion of Byers and Snyder attorneys for the said appellants, the said decree is hereby modified as follows:

Findings of Fact.

First. Silas Olmsted, late of Tarrytown, New York, died in 1874, seized and possessed of the premises described in the complaint in this action, the same being devised by him in and by a certain codicil of his will, which, with the will, was duly admitted to probate. The provisions of the codicil and the provisions of the will concerning this property are as follows:

Paragraph Sixteenth of the Will: "All the rest and residue of my property both real and personal, wheresoever situate, including the house, lot and premises situate in the City and County of New York, adjoining the store, house, lot and premises above devised, to my said son Charles Olmsted, shall as soon as practicable after my decease, be sold by my executors or to the survivor of them, at either public or private sale in their discretion for the best price
97 they or he can obtain, the proceeds whereof, after paying in full all my just debts, funeral expenses, and the costs and expenses of carrying into effect and executing this will, shall be by them or him, divided amongst and paid to my said sons and daughters herein named, share and share alike, the children of each of my said sons and daughters as now are or at my decease shall be deceased to take in equal shares, the share their parents would have taken if living"

Paragraph Second of the First Codicil: "I revoke the clause of my said Will numbered 'Sixteenth' so far only as the same shall apply to my house, lot and premises, situate in the City of New York, which is known as number five hundred (500) Washington Street; as to said house, lot and premises, I direct my executors or the survivor of them to rent the same for five years after my decease, for the best price they shall be able to obtain in their discretion, during which term they shall keep the same fully insured and in good repair, and shall pay all taxes, assessments, premiums for policies of insurance and charge for repairs, and other lawful charges against said property and of the said rents and income thereof. The net proceeds of said rents and income after such payments, I give and bequeath in equal shares to my sons William F. Olmsted and Benjamin Franklin Olmsted, to be paid them from year to year or Quarterly as such rents shall be received, the lawful issue of either or both, who shall die within said five years, (or either or both), to take in equal shares the portions their father would have taken if living.

From and after the expiration of the said five years, I give, devise and bequeath the said house, lot and premises to my said sons William F. and Benjamin Franklin, for and during the natural lifetime of both my said sons and for and during the natural lifetime

the survivor of them; I give and devise the same to such survivor and the lawful issue of such of my said sons as shall be deceased, such issue to take and be entitled in equal shares, and share and share alike; from and after the death of both said sons William F. and Benjamin Franklin, I give and devise equal undivided, one-half part of the said house, lot, premises the lawful issue of each of my said sons, such issue to take share share alike, the children of any deceased child of either of my sons, to take the share their parent would have taken if living. All policies of insurance effected by my executors as above directed be held by them for the benefit of my said sons William F. and njamin Franklin, and their lawful issue, and all monies received reon, if not expended by my said executors in repairs or in retions on said lot and premises, for purpose of distribution to be med and treated as part of said house, lot and premises. From after the death of both of my said sons William F. and Benin Franklin, I direct my said executors or the survivor of them ell all and singular my said house, lot and premises, number five ndred Washington Street, either at public or private sale for the price that can be obtained in their or his discretion and to exes, acknowledge and deliver all necessary conveyances for the same after retaining the costs and expenses of such sale and conance, to pay over to the net proceeds of such sale to the parties itled as above provided."

That the said premises have been since the commencement of action sold by the said executor, the defendant James Bird, that he now holds in his possession and subject to the decree the Court in this action the sum of Eight Thousand dollars ,000.00) with interest from January 26, 1905.

Second. The two sons of Silas Olmsted named in the said codicil, lliam F. Olmsted, died July 30, 1868, and Benjamin F. Olmsted, vived the said Silas Olmsted. The five years during which the premises were to be rented by the executors, expired during the lifetime of said son Benjamin. The said William F. Olmsted died leaving as his lawful issue, the endants Frances A. Reynolds, Edwin Olmsted and Frederic D. nsted. The said Benjamin F. Olmsted died July 16, 1905, ving issue.

Third. Benjamin F. Olmsted married Mary Jane Olmsted in the te of New York, December 25, 1850, and the issue of said marge were four children, to wit: The plaintiff Daniel H. Olmsted, defendants, Mary O. Decker and Clarence E. Olmsted, and one nk S. Olmsted; that the latter named Frank S. Olmsted left the te before the year 1880, but his whereabouts since that time e been unknown, and it has been impossible to get information cerning him.

Fourth: That the said Mary Jane Olmsted lived in and was a dent of the State of New York, from the time of her marriage her death, and was never in the State of Michigan.

Fifth. That on February 28, 1871, the said Benjamin F. Olmsted formed a marriage ceremony with one Sarah Louise Welchman,

in the State of New Jersey and by her had two sons who are the defendants John H. Olmsted and William H. Olmsted; that sometime during the summer of 1880, the said Benjamin F. Olmsted, the said Sarah Louise Welchman, with their children the said John H. Olmsted and William H. Olmsted, became residents of the State of Michigan and took up permanent domicile there; that thereafter and on the 10th day of February, 1882, the Circuit Court for the County of Wayne, State of Michigan, on the application of the said Benjamin F. Olmsted, reciting that he then was and had been for more than a year past a resident of said State of Michigan, issued a subpœna directing said Mary Jane Olmsted to appear and defend in an action brought by said Benjamin F. Olmsted for di-
100 vorce under the laws of the State of Michigan, upon the ground of extreme cruelty and desertion; that said subpœna was never personally served upon the said Mary Jane Olmsted and on proof that said Mary Jane Olmsted was not a resident and could not be found within the State of Michigan, but was a resident of the State of New York, service of the subpœna was ordered to be made upon said Mary Jane Olmsted by publication in the "Detroit Every Saturday," published in the said County of Wayne, Michigan; that thereafter, the time of said publication having expired and the said Mary Jane Olmsted not having appeared or answered or having been served personally, judgment was taken by said Benjamin F. Olmsted, for the dissolution of the marriage, in said Circuit Court of Wayne County, Michigan, on the 19th day of June, 1882. That thereafter and on the 22d day of August, 1882, in the City of Detroit, Michigan, the said Benjamin F. Olmsted again performed a marriage ceremony with the said Sarah Louise Welchman and lived with her until the time of her death.

Sixth. That in June, 1883, the said Mary Jane Olmsted, commenced an action in the Supreme Court of the State of New York against the said Benjamin F. Olmsted and others, setting forth in her complaint that in June, 1870, said Benjamin F. Olmsted deserted and abandoned her and her children at Newburgh, New York, and took up his abode in New Jersey, demanding a decree of separation against the said Benjamin F. Olmsted and asking for alimony, counsel fee, and the application of the property of the said Benjamin F. Olmsted for the purpose of furnishing the money required therefor. That in such action the judgment roll shows that the said Benjamin F. Olmsted was represented by Andrew Blake, Esq., his attorney, on a motion for the sequestration of the property of the said Benjamin F. Olmsted to pay the alimony, &c.,
101 decreed in the judgment; that on the 22nd day of January, 1885, the judgment was entered in said action for the plaintiff and against the defendants, separating the said Mary Jane Olmsted and Benjamin F. Olmsted from bed and board; also requiring the payment of certain monies by way of alimony, &c.

And that thereafter an appeal from the order above referred to, was taken to the then General Term of the Supreme Court, May 4, 1883, the said Benjamin F. Olmsted being represented by Andrew

ake, Esq., on said appeal, the other defendants, by Calvin Frost, q., and the order was duly affirmed October, 1885.

Seventh. That the premises described in the complaint herein re sold by the executor James Bird some time after the commence- ent of this action.

Eighth. That the above named Sarah Louise Welchman died Jan- ry 30, 1900; that the said Mary Jane Olmsted died January 22, 02, and the said Benjamin F. Olmsted died July 16, 1905.

Ninth. That an act was passed by the legislature of the State of chigan on the 29th day of May, 1881, at which date the said njamin F. Olmsted, the said Sarah Louise Welchman and the fendants John H. Olmsted and William H. Olmsted were resi- nts of Michigan, providing that the child shall be considered gitimate, his parents marrying after his birth, and was approved rch 29, 1881.

Tenth. That in and by the provisions of a compromise judgment the case of Cyrus Olmsted, et al., against James Bird, et al., dated ril 24, 1883, entered by consent of all those having any interest the estate of the late Silas Olmsted, deceased, the distribution of his real property was provided for, and the premises described the complaint in this action, were assured to the therein men- ned William F. Olmsted and Benjamin F. Olmsted, as stated in the first codicil to said Silas Olmsted's Will.

2 Now, therefore it is adjudged and decreed as follows:

First. That the said sum of eight thousand dollars ($8,- 0.00) with interest from January 26, 1906, being the proceeds of sale by the said defendant executor, and all rents collected there- on, represents and stands in the place of the premises described the complaint and for the partition of which this action was ought and is to be divided between the lawful issue of said Benja- n F. Olmsted and William F. Olmsted.

Second. That such lawful issue are as follows: Of Benjamin F. nsted, the plaintiff, Daniel H. Olmsted and defendants Mary O. cker, Clarence H. Olmsted, Frank S. Olmsted, John H. Olmsted l William H. Olmsted, each of whom is entitled to a one-sixth rt of said Benjamin F. Olmsted's one-half share thereof.

Of William F. Olmsted, the defendants, Frances A. Reynolds, Ed- n Olmsted and Frederick D. Olmsted, each of whom is entitled a one-third part of said William F. Olmsted's one-half share ereof.

Third. That the said defendant executor, James Bird, forthwith y and distribute said monies now in his hands to and among the rsons and in the proportions stated in section "Second" of this dgment after payment from said monies the taxable costs and owance of this action, and allowance under Section 3253 of the de of Civil Procedure, as follows:

To the plaintiff, his taxable costs, amounting to one hundred and nety-nine dollars, and an allowance of two hundred and fifty 100 ($250.00) dollars.

To the defendants Ellen A. Olmsted, Mary O. Decker, Clarence Olmsted and Estelle, his wife, who have appeared herein and

answered by Read G. Dilworth, Esq., their attorney, taxable costs, amounting ninety and 51/100 dollars, and an allowance of one hundred dollars 00/100 ($100).

103 To the defendant-executor, James Bird, who has appeared herein and answered by Seth Bird, Esq., his attorney, taxable costs, amounting to Eighty-five dollars, and an allowance of fifty and 00/100 ($50) dollars.

To the defendants John H. Olmsted and William H. Olmsted their costs taxed and adjusted as provided in the said order of the Appellate Division of the Supreme Court amounting to two hundred eighty-two and 05/100 dollars ($282.05).

PETER J. DOOLING, *Clerk.*

Notice of Appeal of Daniel H. Olmsted to Court of Appeals.

Supreme Court, New York County.

DANIEL H. OLMSTED, Plaintiff-Appellant,
against
ELLEN A. OLMSTED and Others, JOHN H. OLMSTED and WILLIAM H. OLMSTED, Defendants-Respondents.

Please take notice that the plaintiff Daniel H. Olmsted hereby appeals to the Court of Appeals of the State of New York from the judgment heretofore entered herein in the office of the Clerk of New York County, on the first day of April, 1907, in favor of the defendants John H. Olmsted and William H. Olmsted, notify-

104 ing the judgment of the Supreme Court entered herein August 2, 1906, in so far as the same changes the original judgment.

Further, that said plaintiff Daniel H. Olmsted appeals from the order of the Appellate Division in the first department entered in the office of the clerk of the said Court, March 8, 1907, and in the office of the Clerk of New York County, March 19, 1907 modifying the judgment of the Supreme Court entered August 2, 1906.

Dated, April 3, 1907.

CHARLES H. LUSCOMB,
Attorney for Plaintiff-App., 120 *Broadway, New York.*

To Byers & Snyder, Esq., Att'ys for John H. Olmsted and William H. Olmsted, Defendants-Respondents.

To Read G. Dilworth, Att'y for Ellen A. Olmsted, et al.

To Peter J. Dooling, County Clerk.

Notice of Appeal of Ellen A. Olmsted, Mary O. Decker, Clarence E. Olmsted and Estelle Olmsted to Court of Appeals.

Supreme Court, New York County.

DANIEL H. OLMSTED, Plaintiff-Appellant,
against
ELLEN A. OLMSTED and Others, Defendants-Appellants, JOHN H. OLMSTED and WILLIAM H. OLMSTED, Defendants-Respondents.

Please take notice that the defendants, Ellen A. Olmsted, Mary Decker, Clarence E. Olmsted and Estelle Olmsted hereby appeal the Court of Appeals of the State of New York from the judgent heretofore entered herein in the office of the Clerk of New ork County, on the first day of April, 1907, in favor of the dendants John H. Olmsted and William H. Olmsted modifying e judgment of the Supreme Court entered herein August 2, 1906, so far as the same changes the original judgment.

Further, that said defendants, Ellen A. Olmsted, Mary O. Decker, Clarence E. Olmsted and Estelle Olmsted appeal from the order of the Appellate Division in the first department entered in the office of the Clerk of New York County, March , 1907, modifying the judgment of the Supreme Court entered ugust 2, 1906.

Dated, April 3, 1907.

READ G. DILWORTH,
Att'y for Def'ts-App'lts, 149 Church St., New York City.

To Byers and Snyder, Esqs., Att'ys for John H. Olmsted and illiam H. Olmsted, Defendants-Respondents.

To Charles H. Luscomb, Att'y for Plaintiff-App., 120 Broadway, ew York.

To Peter J. Dooling, County Clerk.

Stipulation.

Pursuant to Section 3301, of the Code of Civil Procedure, we the ndersigned hereby stipulate that the foregoing are true and comete copies of the Judgment Roll, Case and Exceptions as settled, e Opinion of the Appellate Division, Order of the Appellate ivision affirming judgment as amended, Amended judgment and otices of Appeal to the Clerk of the Court of Appeals, on file in e office of the Clerk of the City and County of New York and rtification thereof by the Clerk of the County of New York is reby waived.

Dated, New York, April 22, 1907.

BYERS & SNYDER,
Attorneys for Defendants-Respondents.
READ G. DILWORTH,
Attorney for Defendants-Appellants.
CHARLES H. LUSCOMB,
Attorney for Plaintiff-Appellant.

107 *Opinion Appellate Division.*

LAUGHLIN, *J.*:

This is an action by one of the sons of Benjamin F. Olmsted, deceased, for a partition or sale of real estate devised by the will of plaintiff's grandfather, Silas Olmsted, to the issue of his two sons, William F. and said Benjamin F., after the death of the survivor of them. The property was sold during the pendency of the action by the executor of said Silas Olmsted, pursuant to a power of sale contained in the will. The decision of the court, from which the appeal is taken, directs a distribution of the proceeds of the sale between lawful issue of said Benjamin F. and William F. Olmsted, pursuant to the provisions of his will. The court found that the lawful issue of said Benjamin F. Olmsted entitled to his share are his sons, the plaintiff and the defendants, Clarence E. and Frank S. Olmsted, and his daughter, the defendant, Mary O. Olmsted, and that the appellants, who are the children of said Benjamin F. Olmsted and one Sarah Louise Welchman, are not the lawful issue of said Benjamin F. Olmsted, and are not entitled to share in the proceeds of the sale.

The facts are not in dispute. Benjamin F. Olmsted was lawfully married to Mary Jane Olmsted in this State on the 25th day of December, 1850, and the four children in whose favor the decree was made are concededly the lawful issue of that marriage. The matrimonial domicile appears to have been, although it is not so specifically shown, in the State of New York, and the wife remained a resident of this State until her death, on the 22d day of January, 1902. It is evident that on or prior to the 28th day of February, 1874, Benjamin F. Olmsted removed to New Jersey, for on that date a ceremonial marriage was performed between him and Sarah Louise Welchman, the mother of the appellants, in that State, and that appellants were born to them there. During the
108 summer of 1880 the father and mother of the appellants and their two children became residents of and permanently domiciled in the State of Michigan. On the 10th day of February, 1882, the Circuit Court for the County of Wayne, in the State of Michigan, on the application of said Benjamin F. Olmsted showing that he then was and for more than a year past had been a resident of that State, issued a subpœna to his wife, Mary J. Olmsted, to appear and defend an action by him for a divorce under the laws of Michigan upon the ground of extreme cruelty and desertion. The subpœna was never served personally upon her and on proof that she was not a resident, and could not be found in the State of Michigan, but was a resident of the State of New York, service was ordered to be made upon her by publication and was thereafter duly made according to the law of the State of Michigan. She was not served personally and she did not appear in the action, and after the service became complete the court on the 19th day of June, 1882, awarded judgment in favor of the plaintiff for the dissolution of the marriage. Thereafter, and on the 22d day of August, 1882, a ceremonial mar-

riage was performed between the father and mother of the appellants in the State of Michigan according to the laws of that State, and they thereafter resided together there until her death. In June, 1883, his wife Mary Jane commenced an action against him in the Supreme Court in this State for a decree of separation and praying for alimony and counsel fees. The defendant did not appear on the trial of the action and judgment was awarded in favor of the plaintiff on the 22d day of January, 1885, separating the parties from bed and board and awarding her alimony. The judgment roll in that action shows that the defendant was represented by an attorney and counselor at law on a motion for the sequestration of his property to pay the alimony awarded in the judgment, and from the order entered the defendant, by the attorney who appeared
109 for him on the motion, appealed to the General Term, where it was affirmed in October, 1885. Mary J. Olmsted died on the 22d day of January, 1902, and Benjamin F. Olmsted died on the 16th day of July, 1905. An act was duly passed by the Legislature of the State of Michigan, approved by the Governor and became of force on the 29th day of March, 1881, which provides as follows: "When, after the birth of an illegitimate child his parents shall intermarry, or without such marriage, if the father shall, by writing under his hand acknowledge such child as his child, such child shall be considered legitimate for all intents and purposes, provided that such acknowledgment shall be executed and acknowledged in the same manner as may be by law provided for the execution and acknowledgment of deeds of real estate and be recorded in the office of the judge of probate of the county in which such father is at the time a resident."

It is unnecessary to state in detail the steps that were taken in the action by the father of the appellants for divorce in the State of Michigan, or to consider the statutes of that State under which the divorce was granted. It is sufficient to say that according to the laws of that State the court acquired jurisdiction and the divorce was duly granted, and the father of the appellants was competent to contract another marriage. Nor is it necessary to quote the statute or to state the facts with respect to his subsequent marriage to the mother of the appellants. That marriage was duly solemnized according to the laws of Michigan and was there valid. By virtue, therefore, of the statute quoted the appellants thereby became legitimized in the State of Michigan. They contend that their status as the legitimate heirs of their father, having thus been established by the law of the State of their residence and that of their parents, must or should be recognized by the courts of every other State
110 of the Union. There is no doubt that as between Mary Jane Olmsted and the father of the appellants, under the decision of the courts of this State, he remained her husband as long as she lived, and neither the divorce nor subsequent marriage in Michigan would be recognized here. In the case of Miller v. Miller (91 N. Y., 315), prior to the enactment of any law in this State legitimizing children born out of wedlock upon the subsequent marriage of their parents, the Court of Appeals gave force and effect to such a statute of Pennsylvania, and said, among other things: "The lawmaking

power can declare a child born to be legitimate or illegitimate, and it is only that power which fixes and determines the status of children born. If born before marriage, the Legislature can remove the disability of its illegitimacy and by its transcendent power can legitimatize and make capable of inheriting the illegitimate child (Blackstone, 4 Inst., 36). If this had been done by an act of the Legislature of the State of New York no question could arise as to the legitimacy of the plaintiff or his right to inherit * * * Legitimacy, which was conferred upon the plaintiff by the laws of Pennsylvania, to which reference has been had, constituted a portion of his right and accompanied him wherever he might reside. Being legitimate in the State of Pennsylvania he continued so in every State and in every country where he chose to establish his residence." The declaration of the Court of Appeals in that case—that the status of legitimacy once created continued in favor of the child thus legitimized wherever he may choose to reside—states the well recognized rule (Am. & Eng. Encyc. of Law, 2d ed., vol. 22, p. 1350; Story on Conflict of Laws, 7th ed., sec. 93; Van Voorhees v. Brintnall, 86 N. Y., 18). The learned counsel for the respondents contend that it is essential to maintain the dignity of the decree of our own court, that we should refuse to recognize the status of the appellants as fixed by the law of the State of Michigan, be-
111 cause it is based upon a divorce which would not be recognized as valid here. The Appellate Division in the Third Department (Matter of Hall, 61 App. Div., 266), held in a case not distinguishable on the facts from the one now at bar, that the legitimacy of children once established under the law of any State or country should be recognized by the courts of this State. We are of opinion that the conflict in the law of divorce between the different States and Territories has gone to the extreme limit and that the status of the parents as husband and wife in one State and as divorced in another should not be visited upon the innocent offspring of the succeeding marriages. The conflict and confusion have arisen over the fact that the public policy of one State manifested by the acts of the Legislature has not favored the granting of divorces on as many grounds as are permitted in other States, and therefore the courts of the one State, while asserting their own jurisdiction to grant divorces without appearance or personal service and upon service by publication, and without inquiring into the matrimonial domicile, have refused to recognize the decrees of the sister States granted on like service and in accordance with the laws of their jurisdiction, and the authority of the courts of one State to refuse to recognize the validity of a divorce in a sister State upon service of publication and without appearance has been sustained by the Supreme Court of the United States, where there was not a matrimonial domicile in the State in which the divorce was granted. The right of the courts of one State to refuse to give full faith and credit to the decisions of the courts of another State, as required by the Federal Constitution, is placed by the United States Supreme Court upon the ground that each State is authorized to declare and protect within its jurisdiction, the status of its own citizens, and that, al-

hough according to the foreign law the courts of the sister State obtained jurisdiction, yet the courts of another State may, in the interest of their own citizen, who was a party served only by
112 publication or without the State and who did not appear, institute an inquiry as to the matrimonial domicile, and if not found to have been in the State where the decree was obtained may regard the decree void upon the ground that the court did not obtain jurisdiction either over the person of the defendant or over the subject-matter of the litigation (Haddock v. Haddock, 201 U. S., 562; Andrews v. Andrews, 188 U. S., 38). That rule, however, should not be extended to the children of a subsequent marriage who are legitimate, where born or subsequently domiciled.

The material facts are stipulated and could not be changed upon a new trial. It follows, therefore, that the decree should be modified by providing that the appellants are the legitimate issue of said Benjamin F. Olmsted and entitled to share equally with his other children and by awarding them costs, and as so modified it is affirmed, without costs of this appeal.

Patterson, P. J.; Clarke and Scott, JJ., concur.

INGRAHAM, *J.*:

The question presented in this case is not as to the legitimacy of the children of Benjamin F. Olmsted, born after a marriage which was valid in the State of Michigan, but whether two children of Benjamin F. Olmsted, who were concededly illegitimate, were legitimatized by the subsequent marriage of their parents in the State of Michigan. It is conceded that these children when born were illegitimate. It is also conceded that the divorce obtained by Benjamin F. Olmsted in Michigan was not effective to dissolve the marriage relation with his wife, who was a resident of this State, so that in this State Benjamin F. Olmsted had a wife entitled to be recognized as such, and her children, the legitimate children of Benjamin F. Olmsted, had a vested remainder in the property
113 to partition which this action is brought. No subsequent marriage of Benjamin F. Olmsted during the life of his wife, unless he was divorced by a judgment which was recognized in this State, could be effective to divest the legitimate children of Benjamin F. Olmsted of the property that had vested in them. Assuming that a legal marriage of Olmsted, when he had capacity to contract a marriage, would legitimatize his illegitimate children, it seems to me that where the title to real property in this State is affected, such a marriage must be one which is valid in this State or would be recognized by the laws of this State.

The property in question is property in which Benjamin F. Olmsted had a life estate, with a remainder that vested in his children. When Olmsted removed from this State he left here a wife and children in whom this remainder had vested. The action for divorce against his wife was not effective to dissolve the marital relation, and his wife, therefore, remained until her death his only lawful wife, and the issue of that marriage his only legitimate children. During the life of his wife he was incapable, according to the law of this

State, of contracting another valid marriage, and his contracting a marriage, which was invalid according to the law of this State, could not, I think, have the effect of legitimatizing children who were concededly illegitimate so as to divest his legitimate children of property that had vested in them. Whether these children would be legitimatized in Michigan by virtue of the law of this State does not seem to be material. The case of Miller v. Miller (91 N. Y., 315), presents an entirely different question. There was no impediment to the marriage of the parents in that case, and the parents of the illegitimate child having contracted a valid marriage which, by the law of their domicile at the time of such marriage, legitimatized the child, it was held that the child, having become legitimate according to the law of the domicile of the parents at the
114 time of the marriage, would here be regarded the same as if born after the marriage. There was no question in that case of divesting the children of one of the parents of the illegitimate child of property that had vested before the alleged marriage, the question arising as to real property acquired subsequent to the alleged marriage by the father as to which he died intestate.

It seems to me that as the parents of the appellants could contract no lawful marriage which would be recognized in this state at the time of the alleged marriage, the effect of which, it is claimed, legitimatized the appellants were not legitimatized in this State, and I think, therefore, the judgment was right and should be affirmed.

115 At a Special Term, Part I, of the Supreme Court, New York County, held at the County Court House, in the Borough of Manhattan, City of New York, on the 17th day of January, 1908.

Present: Hon. Joseph E. Newburger, Justice.

DANIEL H. OLMSTED
against
ELLEN A. OLMSTED et al.

This cause having been brought on upon the remittitur sent down from the Court of Appeals, and now filed in this Court, by which remittitur it appears that an appeal was taken by plaintiff from the order and judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department, and that said judgment of the Appellate Division was reversed and that of the Trial Court affirmed with costs in both Courts, and that the record and proceedings had been directed by said Court of Appeals to be remitted to this Court and this Court directed to enforce the said judgment of the Court of Appeals according to law.

Now therefore, on motion of Charles H. Luscomb of counsel for plaintiffs

It is hereby ordered and adjudged, that the judgment of the said Court of Appeals be and the same is hereby made the judgment of this Court; that the said defendant executor James Bird further pay to the plaintiff and also pay to the defendants, who were appellants,

Ellen A. Olmsted, Mary O. Decker, Clarence E. Olmsted and Estelle his wife, their and each of their costs both in the Appellate Division of the Supreme Court and in the Court of eals, to be and as taxed by the Clerk of this Court and inserted he judgment as well as for the amount adjudged to be paid in by the judgment of this Court in this cause entered August 2, 5, and that this order or judgment be annexed to the judgment

nter.

J. E. N.,
Justice Supreme Court.

. J. D.

Copy.
[Seal New York.]

PETER J. DOOLING, *Clerk.*

Please take notice that within is a copy of order duly entered in the office of the Clerk of New York County, this lay of January 1908.

CHARLES H. LUSCOMB, *Pff's Att'y.*

'o Byers & Snyder, Esqs., Att'ys for Def'ts John H. & W. H. sted.

Endorsed:] Supreme Court, New York County. Served 28th. iel H. Olmsted against Ellen A. Olmsted et al. Order Directing dgment on Remittitur and Notice of Entry. Charles H. Luscomb, orney for Plaintiff, 120 Broadway, Equitable Building, New York y. Due and timely service of a copy of the within is hereby adted. Dated , 190 . To Byers & Snyder, Esqs., Att'ys Def'ts J. H. & W. H. Olmsted, 11 Park Row, N. Y.

SUPREME COURT,
New York County:

DANIEL H. OLMSTED, Plaintiff,
against
LEN A. OLMSTED, Wife of Daniel H. Olmsted; MARY O. DECKER, Frank S. Olmsted, Clarence E. Olmsted and Estelle, His Wife; Francis A. Reynolds and Delos Reynolds, Her Husband; Edwin Olmsted, Frederick D. Olmsted, and Ruth, His Wife; John H. Olmsted and Amelia, His Wife; William H. Olmsted and Grace, His Wife, and James Bird, as Executor under the Will of Silas Olmsted, Deceased, Defendants.

Judgment, Dated January 18, 1908.

A judgment in this action in favor of the plaintiff against the fendants having been rendered in this Court on the 21st day of ugust, 1905, directing the distribution of certain monies in the nds of the defendant executor and for costs and allowances ad dged in said judgment, and the defendants, John H. Olmsted and

William H. Olmsted having appealed from said judgment to the Appellate Division of this Court for the First Judicial Department, and an order of affirmance and modification having been made thereon by said Appellate Division on the 8th day of March, 1907, and a judgment modifying the judgment of August 2, 1906, having been entered thereon, on the first day of April, 1907, and the plaintiff herein and the defendants, Ellen A. Olmsted, Mary O. Decker, Clarence E. Olmsted and Estelle Olmsted having appealed therefrom to the Court of Appeals, and the said Court of Appeals having sent hither its remittitur filed herein the 17" day of January, 1908, by which it appears that the said Court of Appeals has
119 reversed the order and judgment of the Appellate Division of the Supreme Court, appealed from herein, and affirmed the judgment of the Trial Court, entered August 2, 1906, with costs in both Courts, and has given judgment accordingly, and has remitted the said judgment of the Court of Appeals to this Court to be enforced according to law, and this Court having, by order entered herein, the 17" day of January, 1908, ordered that said judgment be made the judgment of this Court, with costs both to the plaintiff and also to the defendants who were appellants, Ellen A. Olmsted, Mary O. Decker, Clarence E. Olmsted and Estelle Olmsted, the same having been adjusted by the Clerk, as per bill of costs, filed with the Clerk of this Court,

Now on motion of Charles H. Luscomb, plaintiff's attorney, it is adjudged, that the said judgment of the Court of Appeals be and the same is hereby made the judgment of this Court; that the said defendant executor, James Bird, further pay to the plaintiff and also pay to the defendants who were appellants, Ellen A. Olmsted, Mary O. Decker, Clarence E. Olmsted and Estelle his wife, their and each of their costs, both in the Appellate Division of the Supreme Court and in the Court of Appeals, to be and as taxed by the Clerk of this Court as follows: To the plaintiff the sum of Three hundred and nine 95 100 ($309.95) dollars, and to the defendant appellants Ellen A. Olmsted, Mary O. Decker, Clarence E. Olmsted and Estelle Olmsted the sum of One hundred ninety six 60 100 ($196.60) dollars, as well as the amount adjudged to be paid in and by the judgment of this Court, in this cause, entered August 2, 1906, and that this order or judgment be annexed to the judgment roll.

PETER J. DOOLING, *Clerk*.

M. D. J.

A copy.

[Seal New York.]

PETER J. DOOLING, *Clerk*.

120 Please take notice that within is a copy of Judgment duly entered in the office of the Clerk of New York County, this 18 day of January 1908.

CHARLES H. LUSCOMB, *Pltf's Att'y*.

To Byers & Snyder, Esqs., Att'ys for Def'ts J. H. & W. H. Olmsted.

To Seth Bird, Esq., Att'y for Def't James Bird.

ndorsed:] Supreme Court, New York County. Daniel H. ted against Ellen A. Olmsted et al. Judgment on Remittitur Notice of Entry. Charles H. Luscomb, Attorney for Plaintiff, Broadway, Equitable Building, New York City. Due and timely e of a copy of the within is hereby admitted. Dated ——— ——, To Byers & Snyder, Esqs., Att'ys for John H. & W. H. ted, 11 Park Row, N. Y.

Copy.

now all men by these Presents, That we, John H. Olmsted, of rk, New Jersey and William H. Olmsted, of Plainfield, New y, as principals, and the National Surety Company having an at No. 115 Broadway, Borough of Manhattan, City of New , as surety, are held and firmly bound unto Daniel H. Olm- Ellen A. Olmsted, wife of Daniel H. Olmsted; Mary O. Decker, k S. Olmsted, Clarence E. Olmsted and Estelle, his wife; Fran- A. Reynolds and Delos Reynolds, her husband; Edwin Olmsted, erick D. Olmsted and Ruth, his wife, and James H. Bird, as cutor under the Will of Silas Olmsted, deceased, in the full and sum of Five Hundred ($500.00) Dollars, to be paid to the said iel H. Olmsted, Ellen A. Olmsted, wife of Daniel H. Olmsted; y O. Decker, Frank S. Olmsted, Clarence E. Olmsted & Estelle, wife; Frances A. Reynolds and Delos Reynolds, her husband; in Olmsted, Frederick D. Olmsted & Ruth, his wife, — James Bird as Executor under the Will of Silas Olmsted, deceased, their ain attorneys, executors, administrators, or assigns to which ment well and truly to be made, we bind ourselves, our heirs, utors and administrators, jointly and severally, by these presents ed with our seals and dated this second day of March, 1908.

Whereas, lately at a Supreme Court in the State of New York the County of New York in a suit depending in said Court, be- n Daniel H. Olmsted, plaintiff vs. Ellen A. Olmsted, wife of iel H. Olmsted; Mary O. Decker, Frank S. Olmsted, Clarence E. sted and Estelle, his wife; Frances A. Reynolds and Delos Rey- ds, her husband; Edwin Olmsted, Frederick D. Olmsted and h his wife; John H. Olmsted and Amelia, his wife; William H. sted and Grace, his wife; and James H. Bird as Executor under Will of Silas Olmsted deceased, defendants, a final judgment was dered against the said John H. Olmsted & William H. Olmsted January 18th, 1908. And the said John H. Olmsted & William Olmsted having obtained a writ of error and filed a copy thereof the Clerk's Office of the said Court to reverse the said judgment the aforesaid suit, and a citation directed to the said Daniel H sted, Ellen A. Olmsted, wife of Daniel H. Olmsted, Mary O ker, Frank S. Olmsted, Clarence E. Olmsted & Estelle, his wife; nces A. Reynolds & Delos Reynolds, her husband; Edwin Olm- d, Frederick D. Olmsted & Ruth, his wife, & James H. Bird, as cutor under the Will of Silas Olmsted, deceased, citing and ad- ni-shing them to be and appear at a Supreme Court of the United tes, at Washington, within thirty days from the date thereof

Now, the condition of the above obligation is such, That if the said John H. Olmsted & William H. Olmsted shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Signed, delivered in presence of

[SEAL.]

JOHN H. OLMSTED. [SEAL.]
WILLIAM H. OLMSTED. [SEAL.]
NATIONAL SURETY COMPANY.
By JOEL RATHBONE, *Vice-President.*

Attest:

M. W. GEWECKE,
Resident Ass't Secretary.

Approved, and to operate as Supersedeas if filed by Mar. 18, 1908.
Dated, Mar. 5, 1908 at Washington, D. C.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

122 STATE OF NEW YORK,
County of New York, ss.:

On this 2nd day of March 1908, before me personally appeared Joel Rathbone, Vice-President of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the County of New York; that he is the Vice-President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Vice-President of said Company by like authority; and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided in Section 3, Chapter 720, of New York Session laws of 1893. And the said Joel Rathbone further said that he is acquainted with M. W. Gewecke and knows him to be the Res. Ass't Secretary of said Company; that the signature of the said M. W. Gewecke subscribed to the said instrument is in the genuine handwriting of the said M. W. Gewecke and was thereto subscribed by the like order of the said Board of Directors and in the presence of him, the said Vice-President.

H. W. DU MOULIN,
Commissioner of Deeds for the City of New York.

Copy of By-Laws.

Be it Remembered, That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the first day of May, 1906, a quorum being present, the following By-Law was adopted:

TICLE XIII. SEC. 1. *Signatures required:* All bonds, recog-
ces, contracts of indemnity, policies of insurance and all
writings obligatory in the nature thereof, shall be signed
e President, the Vice President, Second Vice President, Third
President, or Fourth Vice President, a Resident Vice Presi-
or Attorney-in-fact, and except when signed by an Attorney-
t, shall have the seal of the Company affixed thereto duly
ed by the Secretary, an Assistant Secretary, or Resident Assist-
Secretary. The Vice President, Second Vice President, Third
President, Fourth Vice President and Resident Vice Presi-
shall each have authority to sign such instruments, whether
President be absent, or incapacitated or not; and the Assistant
taries and Resident Assistant Secretaries shall each have
ority to seal and attest such instruments whether the Secretary
sent, or incapacitated or not. All such instruments executed
rein provided shall be as binding upon the Company as if
ame were signed by the President, and duly sealed and attested
ne Secretary."

E OF NEW YORK,
County of New York, ss:

M. W. Gewecke, Resident Ass't Secretary of the National Surety
any, have compared the foregoing By-Law with the original
of, as recorded in the Minute Book of said Company, and do
y that the same is a correct and true transcript therefrom, and
e whole of said original By-Law.
ven under my hand and the seal of the Company in the County
w York, this 2nd day of March, 1908.

M. W. GEWECKE,
Resident Ass't Secretary.

J. D.

[Endorsed:] U. S. Supreme Court. Daniel H. Olmsted,
Def. in error, against Ellen A. Olmsted et al., Defs in error.
H. Olmsted and Wm. H. Olmsted, Pl'ffs in error. Copy.
rseleas Bond on Writ of Error. M. W. Byers, Att'y for Pl'ffs
rror, 11 Park Row, N. Y. City.

124 *Petition for Writ of Error to the Supreme Court of the State of New York.*

In the Supreme Court of the United States.

DANIEL H. OLMSTED, Defendant in Error,
against
ELLEN A. OLMSTED, JAMES BIRD, et al., Defendants in Error; JOHN H. OLMSTED and WILLIAM H. OLMSTED, Plaintiffs in Error.

To the Honorable the Supreme Court of the United States:

The petition of John H. and William H. Olmsted, two of the defendants above named, and the plaintiffs in error, respectfully shows:

That they are citizens of the United States and that in the above entitled action, on the 18th day of January, 1908, final judgment was rendered against your petitioners by the Supreme Court of the State of New York, upon a decision of the Court of Appeals of the State of New York, the latter being the highest court of law or equity in said State of New York, wherein it was adjudged that the defendants in error, Daniel H. Olmsted, Mary O. Decker, Clarence E. Olmsted and Frank S. Olmsted, are the sole "lawful issue" of Benjamin Olmsted, deceased, the father of the said defendants in error, and of the plaintiffs in error. That said judgment was rendered in an action in partition, instituted for the purpose of determining the rights of all of the children of Benjamin Olmsted, deceased, in and to the proceeds of certain
125 real property now awaiting distribution.

That in and by such judgment rendered in pursuance of the decision of said Court of Appeals, it was adjudged that the marriage of the mother of the plaintiffs in error to their father, the said Benjamin Olmsted, by which she became his second wife, which took place in the State of Michigan in 1882, at which time the said Benjamin Olmsted, the mother of the plaintiffs in error, and the plaintiffs in error had acquired and maintained a permanent domicile in the state of Michigan, was insufficient to render the plaintiffs in error legitimate children of said Benjamin Olmsted under a Michigan statute legitimatizing children whose parents subsequently marry, and to thereby enable the said children, the plaintiffs in error, to share in the distribution of the real property in question, which is located in New York; the reason for the decision being that the said Benjamin Olmsted had married his first wife in New York in 1850, and by her had four children, the defendants in error, and had recovered an absolute divorce from her in 1882 having brought an action therefor in the Courts of Michigan after he had acquired a permanent domicile there, and before his second marriage, but in which action the first wife was served with process only by publication, and judgment against her was entered by default.

That in and by such judgment rendered in pursuance of the

ision of the Court of Appeals, it was adjudged that the refusal to
tain the validity of the Public Act of the State of Michigan in
estion, to wit: No. 55 of the year 1881, by reason of which your
itioners became legitimate children of their father, and to give
e same full effect, faith and credit in the State of New York,
did not violate the provisions of Section 1 of Article IV of
6 the Constitution of the United States providing that "full
faith and credit shall be given in each State to the public
s records and proceedings of every other State." It was like-
se adjudged that the divorce decree recovered by your petitioner's
her from his first wife, set forth in the exemplified copy of the
oceedings in which it was recovered, which exemplified copy was
nexed to and formed part of the record on appeal before said
urt of Appeals, was insufficient to render valid the marriage which
gitimatized your petitioners as aforesaid, and that the failure to
ve to such decree in New York the effect claimed for it by your
titioners, did not violate the provisions of the Constitution of the
ited States above quoted.

That to the refusal by the trial court to find that your petitioners
e the lawful issue of their father, your petitioners filed exceptions
fore the Appellate Division of the Supreme Court, and the judg-
ent of that Court was in their favor. Before the Court of Appeals
e point was expressly made that a judgment against your peti-
ners would deprive them of rights guaranteed to them by the
nstitution of the United States for it was said at Page 11 of
espondents Points, "It will be noted that the Constitution of the
ited States enjoins this court to recognize the status of the respon-
nts as created by the legislature of Michigan, in which state they
ere domiciled at the time the Statute took effect. See U. S. Con-
tution, Article IV, Section 1, which provides
"Full faith and credit shall be given in each state to the public
ts and judicial proceedings of every other state."
See *Miller v. Miller 18 Hun, 507 at 521*"

7 In the answer of the petitioners it will be seen that their
whole case is made to depend upon the duty of the New
ork Courts to give full faith and credit to the divorce decree re-
vered by their father, and the statute legitimatizing them, both
which emanate from the State of Michigan.

That under the practice existing in the courts of the state of New
ork, the errors relied upon are not contained in formal assign-
nts of error, but in such a case as this, are based upon exceptions
ken to the findings of fact and conclusions of law made by the
ial justice, and to the refusal by him to make certain requested
dings, which exceptions appear in the record of this case.

That by the final judgment of said Supreme Court of the State
f New York, entered upon said decision of said Court of Appeals,
anifest error has happened to the great damage of your petitioners,
ll of which appears in the record, and final order of said Court of
ppeals and the final judgment of said Supreme Court of the State
f New York.

Wherefore, your petitioners pray for the allowance of a writ of

error from the Supreme Court of the United States to the Supreme Court of the State of New York and the judges thereof, to the end that the complete record in said matter may be removed into the Supreme Court of the United States, and the error complained of by your petitioners may be examined and corrected, and the said judgment properly amended so as to provide that the status acquired by your petitioners as the legitimate children of their father, in the state of Michigan, may be recognized and enforced together with all the incidents thereof, in the state of New York, according to the rights guaranteed to your petitioners under the Constitution of the United States.

128 And your petitioners will ever pray.

JOHN H. OLMSTED.
WILLIAM H. OLMSTED

STATE OF NEW JERSEY,
County of Essex, ss:

John H. Olmsted being duly sworn deposes and says: that he is one of the petitioners named in the foregoing petition; that he has read the same and knows the contents thereof and that the same is true to his own knowledge except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

JOHN H. OLMSTED.

Sworn to before me, this 1st day of February, 1908.
[Seal of James J. Gibbs, Notary Public for New Jersey.]
JAMES J. GIBBS,
Notary Public for New Jersey.

STATE OF NEW JERSEY,
County of Union, ss:

William H. Olmsted being duly sworn deposes and says: that he is one of the petitioners named in the foregoing petition; that he has read the same and knows the contents thereof and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

WILLIAM H. OLMSTED.

Sworn to before me, this 1st day of February, 1908.
[Seal of Nelson Runyon, Notary Public, Plainfield, N. J.]
NELSON RUNYON,
Notary Public for New Jersey.

129 Service of a copy of the within Petition is hereby admitted this 9th day of Mar., 1908.

C. T. LUSCOMB,
Att'y for Deft in Error, Daniel H. Olmsted.
READ G. DILWORTH,
Att'y for Def'ts in Error, Ellen A. Olmsted, et al.
SETH BIRD,
Att'y for Deft in Error, James Bird.

[Endorsed:] United States Supreme Court. Daniel H. Olmsted, Defendant in Error, against Ellen A. Olmsted, James Bird, et al., Defendants in Error; John H. and William H. Olmsted, Plaintiffs in Error. Petition for Writ of Error. M. W. Byers, Attorney for J. H. & W. H. Olmsted, 11 Park Row, New York City.

130 *Assignment of Errors.*

The Supreme Court of the United States.

DANIEL H. OLMSTED, Defendant in Error,
against
ELLEN A. OLMSTED, JAMES BIRD, et al., Defendants in Error; JOHN H. OLMSTED and WILLIAM H. OLMSTED, Plaintiffs in Error.

Now come the said plaintiffs in error, and respectfully submit that the record, proceedings, and decision of the Court of Appeals of the State of New York, and the final judgment entered thereupon in the Supreme Court of the State of New York, in the above entitled matter, there is manifest error, in this, to wit:

First. That the court erred in holding that legitimacy which was conferred upon the plaintiffs in error as a result of the divorce decree duly recovered by their father from his first wife while he was permanently domiciled in Michigan, in the courts of that state, pursuant to which decree he married the mother of the plaintiffs in error, thereby bringing into effect a public Act of the State of Michigan, legitimatizing them, did not continue to exist so as to entitle them to two several shares in the proceeds of the real property in question, situate in the State of New York, thereby holding that the following was not violated as to the plaintiffs in error, *Constitution of the United States Art. IV. Sec. 1* "full faith and "credit shall be given in each state to the public acts, records, and "judicial proceedings of every other State", because the service of process in the action brought by the father of the plaintiffs
131 in error to recover a divorce from his first wife, was by publication, and the statute referred to never came into operation because the marriage of the father of the plaintiffs in error to their mother, which took place in Michigan after the recovery of the said divorce was polygamous; and upon the further ground that the statute referred to was invalid so far as the rights of the plaintiffs in error are concerned.

Second. That the court erred in reversing the order of the Appellate Division of the Supreme Court of the State of New York, modifying the original judgment of the Supreme Court of the State of New York and by ordering judgment against these plaintiffs in error by virtue of which they are adjudged not to be legitimate children and lawful issue of Benjamin Olmsted, deceased, and in refusing to grant judgment in their favor, as prayed in their answer.

MORTIMER W. BYERS,
Attorney for Defendant-Appellants.
11 Park Row, New York.

132 [Endorsed:] United States Supreme Court. Daniel H. Olmsted, Defendant in Error, against Ellen A. Olmsted, James Bird, et al., Defendants in Error; John H. and William H. Olmsted, Plaintiffs in Error. Assignment of Errors. M. W. Byers, Attorney for Plaintiffs in Error, 41 Park Row, New York City.

Service of a copy of the within assignment of Errors is hereby admitted this 9th day of Mar., 1908.

C. H. LUSCOMB,
Att'y for Def't in Error, Daniel H. Olmsted.
READ G. DILWORTH,
Att'y for Def't in Error, Ellen A. Olmsted et al.
SETH BIRD,
Att'y for Def't in Error Jas. Bird.

133 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Daniel H. Olmsted, Ellen A. Olmsted, wife of Daniel H. Olmsted; Mary O. Decker, Frank S. Olmsted, Clarence E. Olmsted and Estelle, his wife; Frances A. Reynolds and Delos Reynolds, her husband; Edwin Olmsted, Frederick D. Olmsted and Ruth, his wife, and James H. Bird, as Executor under the Will of Silas Olmsted, deceased.

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of the State of New York in the County of New York, wherein John H. Olmsted and William H. Olmsted are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Rufus W. Peckham, Associate Justice of the said Supreme Court of the United States, this 27 day of February, 1908.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

134 [Endorsed:] United States Supreme Court. Daniel H. Olmsted, Defendant in Error, against Ellen A. Olmsted, James Bird et al., Defendants in Error; John H. Olmsted and William H. Olmsted, Plaintiffs in Error. Citation. M. W. Byers, Attorney for Plaintiffs in Error, 41 Park Row, New York City.

Service of a copy of the within citation is hereby admitted this 9th day of March, 1908.

C. H. LUSCOMB,
Att'y for Def. in Error Daniel H. Olmsted.
READ G. DILWORTH,
Att'y for Def. in Error Ellen A. Olmsted et al.
SETH BIRD,
Att'y for Def. in Error Jas. Bird.

35 *Writ of Error.*

THE UNITED STATES OF AMERICA, *ss.*:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of New York:

Because in the record and proceeding as alleged in the rendition of the judgment of a plea which is in the said Supreme Court of the State of New York before you, or some of you, a judgment was rendered on an order of the Court of Appeals of the State of New York being the highest court of law or equity of the said State in which a decision could be had, in an action by Daniel H. Olmsted, plaintiff, against Ellen A. Olmsted, John H. Olmsted, William H. Olmsted, James Bird, et al., defendants, wherein was drawn in question the title, right and privilege set up and claimed by the defendants John H. Olmsted and William H. Olmsted, by virtue of a certain divorce decree recovered by their father Benjamin Olmsted against his first wife, Mary Jane Olmsted, contained in a judgment roll duly exemplified from the Circuit Court for the county of Wayne, Michigan, and by virtue of a certain Public Act of the Legislature of Michigan being No. 55 of 1881, whereby the plaintiffs in error became the legitimate children of their father, and wherein the decision was against the title, right and privilege specifically set up and claimed under Section 1 of Article IV of the Constitution of the United States, providing that "full faith and credit shall be given in each State to the Public Acts and judicial proceedings of every other State," and thereby manifest error hath happened to the great damage of said John H. Olmsted and William H. Olmsted, and we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you if judgment be therein
36 given that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof in said Supreme Court to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States of America, the 27 day of February, 1908.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
R. W. PECKHAM,
Associate Judge of the Supreme Court of the United States.

Supersedeas Bond to be approved and filed in the sum of *of* five five hundred dollars.

R. W. P.,
Associate Justice of the Supreme Court of the United States.

137 [Endorsed:] United States Supreme Court. Daniel H. Olmsted, Defendant in Error, against Ellen A. Olmsted, James Bird, et al., Defendants in Error; John H. Olmsted and William H. Olmsted, Plaintiffs in Error. Writ of Error. M. W. Byers, Attorney for Plaintiffs in Error, 11 Park Row, New York City.

Received M'ch 11th, 1908.

PETER J. DOOLING, *Clerk.*

Service of a copy of the within writ of error is hereby admitted this 9th day of Mar. 1908.

C. H. LUSCOMB,
Att'y for Def. in Error Daniel H. Olmsted
READ G. DILWORTH,
Att'y for Def. in Error Ellen A. Olmsted et al.
SETH BIRD,
Att'y for Def. in Error Jas. Bird.

138 STATE OF NEW YORK,
County of New York:

Clerk's Office of the Supreme Court of the State of New York, for the County of New York.

I, Peter J. Dooling, Clerk of the County of New York and of the Supreme Court of the State of New York, for the said County of New York, by virtue of the annexed writ of error which was served upon me on the Eleventh day of March 1908 and in obedience thereto, do hereby certify that the foregoing Pages Numbered from one to one hundred and twenty inclusive contained a true and complete transcript of the record and proceedings had in said Court in the suit mentioned in said writ of error as the same remain of record and on file in my office and that annexed hereto is the petition for the said writ of error the citation to the writ in error with proof of service of the same, the said writ of error served upon me.

In Testimony Whereof, I have caused the Seal of the said Court to be hereunto affixed at my office in the City and County of New York, on the ——

[Seal of New York.]

PETER J. DOOLING, *Clerk.*

DANIEL H. OLMSTED, Appellant,
v.
IX H. OLMSTED et al., Respondents, Impleaded with Others, Appellants.

Decided January 7, 1908.)
peal from a judgment of the Appellate Division, first depart-
, modifying, and as modified affirming, a judgment entered
a decision.

harles H. Luscomb and Read G. Dilworth for appellants, Morti-
W. Byers for respondents.

GHT, *J.*:

his action was brought to obtain a partition or sale of real estate
ned by the appellants as tenants in common, and for a determina-
of the rights of the parties to share in the proceeds of any sale
should be made thereof.
appears, in substance, from the findings made by the trial
t, that the real estate in question was formerly owned by one
Olmsted, late of Tarrytown, N. Y., who died in 1874, leav-
a last will and testament with codicils attached which were ad-
ed to probate, by which he devised the use of the property to
sons, William F. and Benjamin Franklin, during their natural
, and upon their death the remainder was to vest in the "*lawful*
of each of my said sons, such issue to take share and share alike;
children of any deceased child of either of my said sons to take
share their parent would have taken if living." Benjamin F.
sted, one of the sons of the decedent to whom a life interest
he real estate in question had been given by the testator, was
ried to Mary J. Olmsted in the state of New York on the 25th
of December, 1850, by whom he had four children, to wit,
plaintiff, Daniel H. Olmsted, and the defendants Mary O. Decker,
rence E. Olmsted and Frank S. Olmsted; that Benjamin F. and
wife Mary were residents of the state of New York at the time
heir marriage and at the time their children were born; that
y continued to be a resident of this state until her death, on the
day of January, 1902.
t further appears from the finding that on the 28th day of Feb-
ry, 1874, Benjamin F. Olmsted performed a marriage ceremony
h one Sarah Louise Welchman in the state of New Jersey, by
om he had two children who were the defendants John E. Olm-
and William H. Olmsted; and that thereafter during the sum-
r of 1880 they removed to the state of Michigan, and on the
h day of February, 1882, in the Circuit Court of Wayne county,
chigan, on the application of Benjamin F. Olmsted, reciting that
then was and had been for more than a year a resident of the
of Michigan, procured a subpœna to be issued, directing Mary

on account of extreme cruelty and desertion; that the subpœna was never personally served upon Mary J. Olmsted, and on proof that she was not a resident of the state of Michigan, but was a resident of the state of New York, service thereof was ordered to be made by publication in a Detroit paper. After the period of publica-
140 tion prescribed by the order had expired, the said Mary Jane Olmsted not having appeared or answered, judgment was entered by said Benjamin F. Olmsted for a dissolution of the marriage, and thereafter, on the 22d day of August, 1882, in the city of Detroit, Michigan, Benjamin F. Olmsted again performed a marriage ceremony with the said Sarah Louise Welchman, and lived with her until the time of her death, January 30th, 1900; that in June, 1883, Mary Jane Olmsted commenced an action in the Supreme Court in the state of New York against Benjamin F. Olmsted and others, setting forth in her complaint that in June, 1870, Benjamin F. Olmsted deserted and abandoned her and her children at Newburgh, N. Y., and took up his abode in New Jersey, and demanded a decree of separation against him and asking for alimony and counsel fee, and the application of the property of the said Benjamin F. Olmsted for the purpose of furnishing the money required therefor; that in that action the judgment roll shows that Benjamin F. Olmsted was represented by an attorney on a motion for the sequestration of his property to pay the alimony, etc., decreed in the judgment; and that on the 22d day of January, 1885, judgment was entered in that action for the plaintiff Mary Jane Olmsted and against the defendant Benjamin F. Olmsted, separating Mary Jane from him and requiring the payment by him of alimony and counsel fees; that thereafter an appeal was taken from the judgment so entered to the General Term of the Supreme Court, in which the judgment was affirmed. Benjamin F. Olmsted died July 16th, 1905, and thereupon his lawful issue became entitled to the real estate as remaindermen.

The trial court found as conclusions of law that the lawful issue of Benjamin F. Olmsted were the plaintiff, Daniel H. Olmsted, and the defendants Mary O. Decker, Clarence E. Olmsted and Frank S. Olmsted; that the defendants John H. Olmsted and William H. Olmsted, the children of Benjamin F. Olmsted and Sarah Louise Welchman, were not the lawful issue of Benjamin F. Olmsted, and were not entitled to any share in the said property. The Appellate Division has modified the judgment, holding that the defendants John H. Olmsted and William H. Olmsted are the lawful issue of Benjamin F. Olmsted, and are entitled to share in the said property.

Under the common law, the legitimacy or illegitimacy of a person was determined by the law of the country in which he was born. If by the law of that country he was legitimate, he should be deemed legitimate everywhere. If, however, by that law he was illegitimate, then he should be deemed illegitimate in every other country. There were some exceptions; for instance, if the parents were citizens or representatives of some foreign country, passing through or temporarily staying in the country of the birth. But these exceptions do not arise in the case under consideration and are not necessary

o be now considered. In some of the countries of Europe there
vere laws under which illegitimate children became legitimate by
he subsequent marriage of their parents. This was the case in
France, and its courts consequently held that a child born out of
wedlock in its country became legitimate by a subsequent
141 marriage of its parents, although the marriage took place in
England where a different law prevails, and where a subse-
quent marriage would not have the effect of rendering the child
egitimate. (See Story on Conflict of Laws [Redfield edition], secs.
93, 93a, and other authorities cited.)

In this state the law is now settled in accordance with the French
ule, that when an illegitimate child has by the subsequent marriage
of his parents become legitimate by virtue of the laws of the state
or country where such marriage took place and the parents were
domiciled, he is thereafter legitimate everywhere and is entitled to
all of the rights flowing from that status, including the right to in-
herit, notwithstanding the fact that he was born in another country.
(Miller v. Miller, 91 N. Y. 315.)

Recently many of our sister states have adopted statutes similar
to those of France, providing that the subsequent marriage of the
parents legitimatized the child or children previously born. Such
a statute was adopted in Michigan in 1881, and in this state in 1895.
These statutes, however, were passed long after the death of Silas
Olmsted and the admitting of his will to probate, under which his
legitimate grandchildren became vested as remaindermen in the
estate left by him, subject to the life use by their father. But the
statutes to which we refer, both in this state and in Michigan, only
relate to such marriages between parents as may be lawfully made,
and not to those which are polygamous, incestuous, or are prohibited
by law. (See Story on Conflict of Laws, secs. 113a and 114.)

In the case of Adams v. Adams (154 Mass. 290) a testator in Mas-
sachusetts bequeathed property to the wife of his brother, "for the
benefit of herself and all the children of such brother." There-
after the brother went to California and obtained a divorce from
his wife without living there the requisite time, or of giving her
notice. He then married another woman, by whom he had pre-
viously had an illegitimate son. Under the Code of California, chil-
dren begotten before marriage were legitimatized by subsequent mar-
riage of the parents. The illegitimate son, claiming to be legitima-
tized by the Code of California, brought an action in equity to es-
tablish his share in the fund left by the testator for the benefit of
the wife and all the children of the testator's brother. The action
was dismissed, the court holding that the validity of the divorce
might be inquired into, notwithstanding the recitals in the record;
that the marriage was void and did not legitimatize the plaintiff,
and consequently he was not entitled to take under the will. That
case, in many respects, is similar to this case. As we have seen,
Benjamin F. Olmsted was a resident of this state, married here, and
had four children. He then left his family and went to New Jersey,
where he lived with another woman, by whom he had two sons.

These children were concededly illegitimate. He then removed to Michigan, brought an action against his wife for divorce, who was still living in the state of New York, and procured a decree in that court annulling the marriage upon the ground that his wife
142 had deserted him, without personal service upon her of process or other notice of the commencement of the action. He then married the mother of his two illegitimate children.

While the courts of this state are required to give full faith and credit to the decrees of the courts of our sister states, we have the right to inquire as to whether such courts had obtained jurisdiction of the person and the subject-matter; and if we find that they had not obtained jurisdiction, then their judgment or decrees become of no force or effect. (Matter of Kimball, 155 N. Y. 68; Winston v. Winston, 165 N. Y. 555; Haddock v. Haddock, 201 U. S. 562; Atherton v. Atherton, 155 N. Y. 129, 181 U. S. 155.) The Michigan courts never obtained jurisdiction of Benjamin F. Olmsted's wife, a resident of this state. She had no notice, and consequently did not appear in the action. The ground upon which the divorce was sought was one not recognized by the laws of this state as a ground for divorce. It was a decree such as the courts of this state have repeatedly refused to recognize as valid and binding. Not only have our courts refused to recognize such decrees as valid, but with reference to this particular decree an action had been brought in this state by Mrs. Olmsted for separate support and maintenance, and for the sequestration of the property of her husband for that purpose; and although he appeared by counsel, the court has adjudged her entitled to such sequestration and support, and upon the ground that he had deserted her and her family. Thus we have an adjudication in our own courts, establishing the fact that Mrs. Olmsted was still his wife, notwithstanding the Michigan decree. It is, however, urged that although the Michigan decree may be invalid and of no force or effect, still the illegitimate children became legitimate under that decree, and, therefore, our courts are bound to recognize them as legitimate. We cannot approve of the soundness of such a contention. As we have already stated, the statute was designed only for such persons as were free from legal obstacles preventing their marriage, and it consequently follows that if the divorce was void, then legal obstacles did exist to the marriage of these persons; for Olmsted had another wife living from whom he had no valid divorce, and his marriage under such circumstances was polygamous; and had the ceremony been performed in this state it would have been bigamous and punishable criminally.

Should we sanction the doctrine contended for, then the legislature in any state could, in effect, nullify our own statutes and deprive our own citizens of property, which under our laws they had become lawfully vested with and entitled to receive. Not only this, but the statute of Michigan, passed in 1881, could change the provisions of a will executed here and probated in 1874, bringing in persons as remaindermen who, under the provisions of the will, were not remaindermen, nor entitled to share in the estate. We think this should not be permitted.

The judgment of the Appellate Division should be reversed, and that of the trial court affirmed, with costs in both courts.

Cullen, Ch. J., O'Brien, Edward T. Bartlett, Vann, Hiscock and Chase, JJ., concur.

Judgment accordingly.

Endorsed on cover: File No. 21,069. New York Supreme Court. Term No. 102. John H. Olmsted and William H. Olmsted, plaintiffs in error, vs. Daniel H. Olmsted, Ellen A. Olmsted, wife of Daniel H. Olmsted; Mary O. Decker et al. Filed March 16th, 1908. File No. 21,069.

FILED.
DEC 17 1909
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

October Term, 1909

No. 102.

JOHN H. OLMSTED and WILLIAM H. OLMSTED,
Plaintiffs-in-Error,

vs.

DANIEL H. OLMSTED, ELLEN A. OLMSTED, MARY O. DECKER, *et al.*,
Defendants-in-Error.

Brief for Plaintiffs-in-Error.

MORTIMER W. BYERS,
Attorney for Plaintiffs-in-Error.

THE REPORTER CO., WALTON, N. Y.
N. Y. Office, Charles Watson Russell,
253 Broadway, Room 205. 'Phone 5909 Barclay
1909

Supreme Court of the United States

OCTOBER TERM, 1909, NO. 102.

JOHN H. OLMSTED and WILLIAM H. OLMSTED,
Plaintiffs-in-Error,

vs.

DANIEL H. OLMSTED, ELLEN A. OLMSTED, wife of Daniel H. Olmsted; MARY O. DECKER, *et al.*,
Defendants-in-Error.

BRIEF FOR PLAINTIFFS-IN-ERROR.

STATEMENT.

This case is submitted to this court upon a writ of error to the Supreme Court of the State of New York to review a judgment in Partition, directing the distribution of the proceeds of the sale of certain real property located in the City and State of New York; by the terms of said judgment the plaintiffs-in-error are wholly denied participation in said proceeds on the theory that they are not legitimate children of their deceased father. The said judgment was entered upon an order of the Court of Appeals of the State of New York, reversing a judgment entered in favor of the plaintiffs-in-error, pursuant to order of the Appellate Division of the Supreme Court of the State of New York, which last mentioned order in turn reversed the holding of the Special Term of the Supreme Court of the State of New York in reference to this question.

See Judgment on Remittitur, Record page 67.
See Decree, Record page 55.
See Decree (Special Term), Record page 24.
See Petition for Writ of Error, Record page 72.
See Writ of Error, Record page 77.

The Parties.

John H. Olmsted and William H. Olmsted, the plaintiffs-in-error, are named as defendants in the record and are the only children of the second marriage of their deceased father, Benjamin F. Olmsted.

See Decree, Record page 58.

Daniel H. Olmsted, Frank S. Olmsted, Mary O. Decker and Clarence E. Olmsted, defendants-in-error, are the only children of the first marriage of the said deceased Benjamin F. Olmsted.

See Decree, Record page 57.

The foregoing are the contesting parties in the litigation, the remaining parties are the children of William F. Olmsted, deceased, whose respective interests in these proceeds have never been in question; James Bird, the executor of Silas Olmsted, deceased, who holds the said proceeds awaiting final judgment herein, and the spouses of the respective parties.

Pleadings.

The complaint states that the children of the first marriage of Benjamin F. Olmsted, deceased, and the children of William F. Olmsted, deceased, are tenants in common of the property in question, pursuant to the terms of the will of Silas Olmsted, deceased, the former owner, and that the children of the second marriage (the plaintiffs-in-error) claim some interest therein.

See Complaint, Record page 4.

The answer of the latter alleges that their father duly procured a divorce from his first wife (whom he married in New York) in the State of Michigan in 1882, where he then had a

permanent domicile, and where he afterwards married their mother. That they had been born before the said marriage, but upon its performance they became legitimate in Michigan, according to a statute of that State then and now in force, and therefore they are the lawful issue of their deceased father and each is entitled to an equal share in the proceeds of the property in question.

The said answer affirmatively alleges:

a. That by a judgment or decree of the Circuit Court of the State of Michigan, duly made and entered in favor of a citizen of Michigan having his permanent domicile there, the plaintiff in that action, the father of these plaintiffs-in-error, was duly divorced from his first wife by a judgment which still remains in full force and effect.

b. That a valid second marriage was thereafter duly entered into in Michigan by their father with their mother.

c. That a statute of Michigan rendered said children born before said second marriage, legitimate children as soon as the said second marriage was performed and that said statute remains in full force and effect.

That by reason of the foregoing, the offspring of the second marriage are legitimate children of Benjamin F. Olmsted, deceased, and entitled to a proportionate share of the inheritance.

See Answer John H. Olmsted *et al.*, Record page 7.

Facts.

The facts are undisputed, the case having been submitted in the first instance, upon an agreed statement. They are as follows:

Silas Olmsted of Tarrytown, Westchester County, New York, died seized and possessed of the real property in New York City, the subject of this action in partition. One-half thereof passes under his will to the "lawful issue" of his son, Benjamin F. Olmsted, who died in July, 1905.

See Agreed Statement, Record pages 15 and 16.

The property has been sold by the executor and one-half of the proceeds thereof will be divided in accordance with the final judgment to be rendered herein.

See Decree, Record page 27, fol. 45.

The facts appear at length in the agreed Statement of Facts upon which the case was submitted to the Special Term of the Supreme Court of New York.

See Agreed Statement, Record page 15.

Benjamin F. Olmsted, the son of Silas, married Mary Jane Olmsted in New York in 1850. By her he had four children, Daniel H. Olmsted, Mary O. Decker, Clarence E. Olmsted and Frank S. Olmsted, defendants.

See Agreed Statement, Record page 17.

Mary Jane remained a resident of the State of New York until her death in 1903.

See Agreed Statement, Record page 17.

About 1870 Benjamin took up his abode in New Jersey, where in 1874 he went through a ceremonial marriage with Sarah Louise Welchman, who lived with him as his wife until her death in 1900.

See Agreed Statement, Record page 17.

Two children were born to them, John H. Olmsted and William H. Olmsted, the plaintiffs-in-error above named.

See Agreed Statement, Record page 17.

In 1880 Benjamin, Sarah and their two children became residents of Michigan where they took up their permanent domicile.

See Agreed Statement, Record page 17.

There they remained for seven or eight years. In February, 1882, Benjamin, while domiciled in Michigan, brought an action for absolute divorce against Mary Jane, his first wife, in the Circuit Court of Michigan upon the grounds of desertion and cruelty.

See Agreed Statement, Record page 17.

The service of process was by publication.

See Agreed Statement, Record page 17.

A decree was entered by default in favor of the plaintiff, dissolving the marriage.

See Agreed Statement, Record page 17, also John H. Olmsted's Exhibit, Record page 48.

Thereafter, and on August 22, 1882, Benjamin and Sarah Louise were parties to a second ceremonial marriage in Detroit, Michigan.

See Agreed Statement, Record page 17.

There was at that time a statute in force in Michigan, which is in evidence, providing that when parents intermarry after children are born the children are thereby rendered legitimate, and said statute has remained in force until today.

See Agreed Statement, Record page 18, also page 17 hereof.

In June, 1883, while Benjamin was still a resident of Michigan, Mary Jane, his first wife, brought an action against certain persons in the New York Supreme Court, among whom was Benjamin Olmsted, in which action she asked for a judicial separation from him, with alimony.

See Agreed Statement, Record page 17.

The judgment roll does not contain any evidence that jurisdiction was ever obtained over Benjamin.

See Plaintiff's Exhibit, Record page 31 *et seq.*

But his New York property was sequestrated and judgment by default for the plaintiff was entered January 22, 1885, at Special Term.

See Plaintiff's Exhibit, Record page 41.

No answer or notice of appearance on behalf of Benjamin is in the record, nor is there any affidavit of service of the summons.

See Requests etc., Record page 29 Finding XV.

It appears that on the motion to sequestrate his property after the trial he was represented at Special Term and also at General Term, but the record does not disclose that he was represented at the trial.

See Decree, Record page 58, fol. 100.

The executor having sold the real property referred to above under a power of sale contained in the will, after the death of William F. Olmsted and Benjamin F. Olmsted, and the "lawful issue" of the latter having become entitled to one-half of the proceeds, this action was begun to determine whether the children of both of the marriages of Benjamin F. Olmsted should share in such distribution, or only the children of the first marriage.

The Special Term of the Supreme Court of New York decided that only the children of the first marriage are such "lawful issue."

See Decree, Record page 28, fol. 47; Opinion, Record page 50.

This judgment was modified by the Appellate Division of the Supreme Court by a vote of four to one, so as to provide that the children of the second marriage (the plaintiffs-in-error), are also "lawful issue," having attained that status in Michigan and are therefore equally entitled to share in the distribution with the children of the first marriage.

See Order, Record page 54; Decree, Record page 55; Opinion, Record page 62.

The Court of Appeals unanimously reversed the last mentioned judgment, reinstating that of the Special Term on the ground that the Courts of New York are not bound to recognize the status of legitimacy created in favor of the plaintiffs-in-error in Michigan, and will refuse so to do and only the children of the first marriage are legitimate.

See Remittitur; Record page 1; Opinion, Record page 79.

Upon the application of the plaintiffs-in-error a writ of error to review of the judgment entered in the New York Su-

preme Court upon said remittitur from the Court of Appeals was granted by Mr. Justice Peckham and pursuant thereto this cause is now brought before this Court.

See Writ of Error, Record page 77.

THE ERRORS ASSIGNED ARE:

First: That the court erred in holding that legitimacy which was conferred upon the plaintiffs in error as a result of the divorce decree duly recovered by their father from his first wife while he was permanently domiciled in Michigan, in the courts of that State, pursuant to which decree he married the mother of the plaintiffs-in-error, thereby bringing into effect a public Act of the State of Michigan, legitimatizing them, did not continue to exist so as to entitle them to two several shares in the proceeds of the real property in question, situate in the State of New York, thereby holding that the following was not violated as to the plaintiffs-in-error.

Constitution of the United States, Art. IV, Sec. 1.

"Full faith and credit shall be given in each state to the "public acts, records, and judicial proceedings of every other "State," because the service of process in the action brought by the father of the plaintiffs in error to recover a divorce from his first wife, was by publication, and the statute referred to never came into operation because the marriage of the father of the plaintiffs-in-error to their mother, which took place in Michigan after the recovery of the said divorce was polygamous; and that the statute referred to was invalid so far as the rights of the plaintiffs-in-error are concerned.

Second: That the court erred in reversing the order of the Appellate Division of the Supreme Court of the State of New York, modifying the original judgment of the Supreme Court of the State of New York and by ordering judgment against these plaintiffs-in-error by virtue of which they are adjudged not to be legitimate children and lawful issue of Benjamin Olmsted, deceased, and in refusing to grant judgment in their favor, as prayed in their answer.

See Record page 75.

ARGUMENT.

POINT I.

THE RECORD IN THIS CASE PRESENTS A FEDERAL QUESTION WHICH SHOULD BE REVIEWED BY THIS COURT.

The plaintiffs in error rely upon that provision of the Constitution known as the "full faith and credit clause" and Sec. 709 and 905 of the Revised Statutes in bespeaking the aid of this court.

The divorce decree recovered by Benjamin F. Olmsted while he was domiciled in Michigan made it possible for him to there contract a new valid marriage, which he did.

See Agreed Statement, Record page 17.

That marriage brought into operation the Statute of Michigan passed May 29th, 1881, at which time Benjamin F. Olmsted and the plaintiffs in error were permanently domiciled in Michigan.

See Agreed Statement, Record page 18.

The said decree of divorce and the said public act combined to create the right claimed under the constitution and the decision sought to be reviewed was against that right which was specially set up and claimed. Thus:

The judgment of the Circuit Court of Michigan awarding the divorce to Benjamin F. Olmsted, and the Statute of Michigan legitimatizing the plaintiffs-in-error were specially pleaded in the answer interposed on their behalf.

See Answer of John H. Olmsted *et al.*, Record page 7.

The allegations are as follows:

"VIII. These defendants realleging and repeating all and every the admissions, denials and allegations, hereinbefore contained, for a further and separate defense, allege, that heretofore and in about the year 1850, the said Benjamin F. Olmsted was duly married to the said Mary Jane Olmsted; that they continued to live and co-habited together as man and wife, until sometime during the year 1870, when the said Mary

Jane Olmsted voluntarily and without cause, separated from the said Benjamin F. Olmsted her husband, and refused to live with him; that shortly thereafter the said Benjamin F. Olmsted gave up his domicile in the State of New York, and sojourned temporarily in the State of New Jersey, and later in the Dominion of Canada, and finally in about the year 1880, went to the State of Michigan for the purpose of actually and in good faith acquiring a permanent domicile there, and he did take up his permanent domicile there actually and in good faith.

IX. That thereafter and on or about the 9th day of February, 1882, the said Benjamin F. Olmsted then being a resident of the State of Michigan and having had his permanent residence there for two years or thereabouts, as aforesaid, instituted a cause or proceeding in the Circuit Court of the State of Michigan for the County of Wayne, which was a court of record having general jurisdiction, against the said Mary Jane Olmsted to dissolve the marriage then subsisting; that the said court had jurisdiction of said cause or proceeding, of the subject-matter thereof and also had jurisdiction of the matrimonial status of the parties thereto; that one of the grounds alleged by the said Benjamin F. Olmsted in his bill of complaint in the said action, was the said desertion by the said Mary Jane Olmsted above set forth.

That thereafter such proceedings were duly had therein according to the Laws and Practise of the State of Michigan; that on or about the 19th day of June, 1882, a final decree of divorce was duly given or made, absolutely dissolving the marriage theretofore existing between the said Benjamin F. Olmsted and the said Mary Jane Olmsted.

X. That the said final decree of divorce was valid and binding upon the said Mary Jane Olmsted; that the said bonds of matrimony theretofore existing between her and the said Benjamin F. Olmsted were then absolutely dissolved; that such decree of divorce ever since said 19th day of June, 1882, has remained unreversed and so has continued to be in full force and effect; that the said final decree of divorce or judgment was and is legal under, and in all respects in accordance with the Laws of the State of Michigan.

XI. That about four years after the said Mary Jane Olmsted had deserted the said Benjamin F. Olmsted as aforesaid, and refused to live and co-habit with him, the said Benjamin F. Olmsted, and one Sarah Louise Welchman, lived and cohabited together as man and wife and the said Sarah Louise Welchman assumed the name of the said Benjamin F. Olmsted. That sometime prior to the time when the said Benjamin F. Olmsted became a resident of the State of Michigan, and had his permanent domicile there as aforesaid two sons were born to the said Benjamin F. Olmsted, of whom the said Sarah Louise Welchman was the mother, which sons were the said John H. Olmsted and William H. Olmsted, the defendants above named.

That when the said Benjamin F. Olmsted became a resident of and established his domicile in the State of Michigan, sometime in the year 1880, as aforesaid, he was accompanied by the said Sarah Louise Welchman Olmsted and the said two sons, who thereupon became residents of the said State of Michigan, and who also had their domicile therein.

XII. That on or about the 23rd day of August, 1882, and after the said Benjamin F. Olmsted had procured the aforesaid judgment of divorce from the said Mary Jane Olmsted, he, the said Benjamin F. Olmsted, and the said Sarah Louise Welchman were duly and lawfully married in the said City of Detroit and State of Michigan, and lawfully lived together and cohabited there as husband and wife, until about the year 1887, when they removed to the City of Newark in the State of New Jersey, and there continued to live together in lawful wedlock, until the death of the said Sarah Louise Olmsted on or about January 20th, 1900.

XIII. That the said Benjamin F. Olmsted had no children other than plaintiff and the defendants, Mary O. Decker and Clarence E. Olmsted, and the defendant John H. Omsted and William H. Omsted, and also one Frank S. Olmsted, referred to in paragraph "Second" of the complaint.

XIV. That the said Benjamin F. Olmsted always recognized the said John H. Olmsted and William H. Olmsted to

be his lawful sons, born as aforesaid and from time to time made his home with either or both of them, down to the day of his death, July 16th, 1905.

XV. That by an act duly passed by the Legislature in the State of Michigan on the 29th day of May, 1881, at which time the said Benjamin F. Olmsted and Sarah Louise Welchman Olmsted and the defendants John H. Olmsted and William H. Olmsted were residents of Michigan and had their permanent domicile there as aforesaid, and which act is now the Law of that State, it is provided, "When, after the birth of an illegitimate child, his parents shall intermarry, or without such marriage, if the father shall, by writing under his hand acknowledged such child as his child, such child shall be considered legitimate for all intents and purposes, *Provided*, That such acknowledgment shall be executed and acknowledged in the same manner as may be by Law provided for the execution and acknowledgment of deeds of real estate, and be recorded in the office of the judge of probate of the county in which such father is at the time a resident. Approved March 29th, 1881."

XVI. That by the marriage of the said Benjamin F. Olmsted and Sarah Louise Welchman Olmsted performed as aforesaid in the City of Detroit, State of Michigan, the defendant John H. Olmsted and William H. Olmsted became and ever since have been the legitimate children and lawful issue of the said Benjamin F. Olmsted, and each is lawfully entitled as such, to a share in the premises described in the complaint herein, equal to that of the other children of the said Benjamin F. Olmsted, to wit, the plaintiff, and the defendants, Mary O. Decker and Clarence E. Olmsted and the said Frank S. Olmsted."

The foregoing gave specific notice to the Courts of New York that they were expected to give full faith and credit to said decree and statute by according to the children of the Michigan marriage the status rights and privileges which they acquired in that state.

This was the sole issue presented and decided. The Michigan decree and statute were stipulated in evidence and the

Supreme Court of New York in its Appellate branch gave full faith and credit to these expressions of the law of a sister commonwealth, while the Court of Appeals adopted the opposite and it is submitted, wholly mistaken view of the obligations imposed by the Federal compact.

That the New York Courts fully grasped the fact that a Federal issue alone was presented appears from the following excerpts from the opinions:

> "The Michigan decree was and is entitled to no recognition in this State (Haddock v. Haddock, U. S. Supreme Court, N. Y. Law Journal, April 27, 1906) * * *. It may also be assumed to be the law that the State of Michigan could and can lawfully give effect within its own territory to the decree of divorce rendered in its court in favor of Benjamin (Haddock v. Haddock, *supra;* Maynard v. Hill, 125 U. S., 190). If then, the Michigan decree is at least valid in Michigan, the subsequent marriage of Benjamin and Sarah Louise was also valid in that State, and it must follow that under the statutes of the State to which reference has already been made, the children of Benjamin and Sarah Louise born before the marriage, became legitimatized in Michigan after the marriage of their parents."
>
> See Opinion, Special Term, Record page 50.

The Appellate Division in overruling the Special Term says:

> "We are of opinion that the conflict in the law of divorce between the different States and Territories has gone to the extreme limit and that the status of the parents as husband and wife in one State and as divorced in another should not be visited upon the innocent offspring of the succeeding marriages * * *. The right of the courts of our State to refuse to give full faith and credit to the decisions of the courts of another State, as required by the Federal Constitution is placed by the United States Supreme Court upon the ground etc. * * *. That rule, however, should not be extended to the children of a subsequent marriage who are legitimate, when born or subsequently domiciled."
>
> See Opinion of Appellate Division, Record page 62.

The Court of Appeals in setting this decision aside also refers to the Federal question as follows:

> "While the courts of this State are required to give full faith and credit to the decrees of the courts of our sister States we have the right to inquire whether such courts had obtained jurisdiction of the person and the subject-matter."

See Opinion, Court of Appeals, Record page 79.

From the foregoing it clearly and unmistakably appears that the Federal question is in issue, and that alone, and that the decision has been against the claim of Federal right, *i. e.* that full faith and credit be given in New York to the Michigan decree of divorce and statute of legitimacy and therefore this court has not only the authority but is charged with the duty of reexamining the questions presented by this record, on Writ of Error.

See Sec. 709 of Rev. Stat.

It was said by Mr. Justice Fuller in *Mutual Life Ins. Co. v. McGrew;* 188 U. S., 291, at 311:

> "Where a judgment of another State is pleaded in defence and issue is made upon it, it may well be ruled that that sets up a right under the third subdivision (of Sec. 709, Rev. Stat.), because the effect of the judgment is the only question in the case."

An examination of the record in the following case discloses that the Federal issue was indicated in the manner employed in the case at bar, and was disposed of by the state Courts deliberately and intentionally.

Haddock v. Haddock, 201 U. S., 562.

Other cases specially relied upon in this connection are:

Green Bay etc. Canal Co. v. Patten, 172 U. S., 58.
Wedding v. Meyler, 192 U. S., 573.
Home for Incurables v. City of New York, 187 U. S., 155.
Roby v. Colehour, 146 U. S., 153.
Furman v. Nichol, 8 Wall., 44.

Perhaps it is unnecessary to state that had the New York Courts obeyed the mandate of the constitution and given

full faith and credit to the Michigan decree and statute, that the status of legitimacy acquired by the plaintiffs-in-error in Michigan would not have been denied in New York and they would have been recognized as "lawful issue" and received their due share of this inheritance, and this court would never have been called upon to consider the case.

Therefore it must be apparent that the only question presented is a Federal issue, raised in the pleadings, and carefully and exclusively considered in the three courts in New York.

The necessity for definite adjudication upon the rights of the children of succeeding marriages is painfully obvious and it is the purpose of the following pages to indicate that under the constitution of the United States, in this enlightened day and generation, there is no such thing as a conditional legitimacy depending solely upon geographical limitations within the territory embraced by the Federal Compact.

POINT II.

THE PLAINTIFFS-IN-ERROR BECAME "LAWFUL ISSUE" OF BENJAMIN F. OLMSTED IN THE STATE OF MICHIGAN.

The result above indicated was reached as follows:

A. The divorce recovered by Benjamin F. Olmsted from his first wife, was and is valid in all respects, in Michigan.

The statute regulating divorce in Michigan in the year 1880 when Benjamin acquired his permanent domicile there and in 1882, when he began his action against his first wife is found in "Howell's General Statutes of the State of Michigan, in force in 1882." Vol. II, p. 1622, Secs. 6228-31 inclusive, and reads as follows:

> "Sec. 6228. A divorce from the bonds of matrimony may be decreed by the circuit court of the county where the parties, or one of them, reside, or by the court of chancery, on the application by petition or bill of the aggrieved party in either of the following cases:
> * * *

"*Fourth*: When either party shall desert the other for a term of two years."

"Sec. 6229. A divorce from bed and board forever, or for a limited time, may be decreed for the ground of extreme cruelty, whether practiced by using personal violence or by any other means; or for utter desertion by either of the parties for a term of two years; and a like divorce may be decreed on the complaint of the wife, when the husband, being of sufficient ability to provide a suitable maintenance for her, shall grossly or wantonly and cruelly refuse or neglect so to do."

"Sec. 6230. A divorce from the bond of matrimony may be decreed for either of the causes mentioned in the preceding section, whenever, in the opinion of the court, the circumstances of the case shall be such that it will be discreet and proper so to do."

"Sec. 6231. No divorce shall be granted, unless the party exhibiting the petition or bill of complaint therefor shall have resided in this State one year immediately preceding the time of exhibiting such petition or bill; or unless the marriage was solemnized in this State and the complainant shall have resided in this State from the time of such marriage to the time of exhibiting the petition or bill."

An examination of the exemplified record of the proceedings in the Circuit Court of Michigan in the said action discloses that Benjamin Olmsted made out a *prima facie* case under the foregoing statute. He had acquired his permanent domicile in Michigan in 1880 and had, therefore, been a resident for upwards of one year, when the proceedings were instituted in February, 1882. He proved that his wife had deserted him and had been guilty of extreme cruelty, and the court duly awarded him a decree of divorce from the bonds of matrimony pursuant to the terms of the statute above quoted.

See John H. Olmsted's Exhibit, Record page 42.

The provisions of the statutes which indicate that under the law of Michigan the Circuit Court of Wayne County acquired jurisdiction over the defendant in that action through the service of the subpoena by publication are as follows:

Id., Secs. 6670, 6671, 6672, 6674.

"Sec. 6670. After the filing of a bill, the circuit court, or circuit court commissioner, shall make an order for the appearance of the defendant, at a future day therein to be specified, as hereinafter directed in the following cases:

"When the defendant resides out of this State, upon proof by affidavit of that fact. * * *."

"Sec. 6671. The order shall require the defendant to appear and answer as follows: * * *."

"*Second.* If a resident of some other of the United States or of one of the territories thereof, or of the British Provinces of North America, in not less than four months."

"Sec. 6672. Such order shall be published within twenty days after it shall have been made, in some newspaper printed in the county, or in such other paper as the court may direct, once in each week for six weeks in succession; but such publication shall not be necessary in any case in which a copy of such order shall have been served on such absent, concealed, or non-resident defendant, personally, at least twenty days before the time prescribed for the appearance of such defendant."

"Sec. 6674. If the defendant shall not appear within the time limited in the order, upon due proof of such publication as shall have been required, or of the personal service of such order, as herein provided, the complainant's bill shall be taken as confessed, and the court may, at the request of the complainant, direct a reference to a master to take proof of the facts and circumstances stated in such bill."

The proceedings having been in accordance with the statutes of Michigan, and no attempt having been made to open the judgment or appeal therefrom, it follows that the validity of the judgment in Michigan is not open to question.

The rule is thus stated in the prevailing opinion in *Haddock v. Haddock* (1906), 201 U. S., 562 (at 572):

"In view of the authority which government possesses over the marriage relation, no question can arise on this record concerning the right of the State of Connecticut (where a similar divorce had been procured) within its borders to give effect to the decree of

> divorce rendered in favor of the husband by the courts of Connecticut, he being at the time when the decree was rendered domiciled in that State."

And in the dissenting opinion of Mr. Justice Holmes (p. 633):

> "It is decided, as well as admitted, that a decree like that rendered in Connecticut in favor of a deserting husband is binding in the State where it is rendered (Maynard v. Hill, 125 U. S., 190)."

B. The marriage of the parents of the plaintiffs-in-error was valid where contracted.

On June 19, 1882, Benjamin F. Olmsted recovered a divorce from his first wife, Mary Jane, which was and is in all respects valid in Michigan; and, being then domiciled in that State, he was in a position to there contract a new marriage, likewise valid in Michigan.

This he did on August 22, 1882, in the City of Detroit, Wayne County, Michigan, at which time and place he married his second wife, Sarah Louise, the mother of the defendants John H. and William H. Olmsted, who were then living.

See Agreed Statement, Record page 17, fol. 29.

C. The plaintiffs-in-error became the legitimate children of Benjamin F. Olmsted by reason of that marriage, according to a public act of the legislature of Michigan.

The statute governing the circumstances under review is found in "*Howell's General Statutes of the State of Michigan in force in 1882*," Vol. II, p. 1505, Sec. 5775a:

> "When, after the birth of an illegitimate child, his parents shall intermarry, or without such marriage, if the father shall, by writing under his hand, acknowledge such child as his child, such child shall be considered legitimate for all intents and purposes; PROVIDED that such acknowledgment shall be executed and acknowledged in the same manner as may be by law provided for the execution and acknowledgment of deeds of real estate, and be recorded in the office of the judge of probate of the county in which such father is at the time a resident."

This statute is in evidence.

See Agreed Statement, Record page 18.

The portion of the foregoing relating to the intermarriage of the parents of illegitimate children is that upon which we rely.

Benjamin and his two children, the said John H. and William H. Olmsted, and their mother, Sarah Louise, were domiciled in Michigan at the time of Benjamin's second marriage.

See Agreed Statement, Record page 17, fol. 28.

Therefore, the said children became legitimate through the marriage of their parents, and their status as legitimate children, having once been created, continues to this day in the State of Michigan.

POINT III.

THIS CASE REQUIRES THAT THE FEDERAL CONSTITUTION AND REVISED STATUTES BE OBEYED, THAT IS TO SAY, FULL FAITH AND CREDIT MUST BE GIVEN IN NEW YORK TO THE MICHIGAN DECREE AND STATUTE.

The following is the exact language of the Constitution:

> "Art. IV, Sec. 1: Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof."

Pursuant to the foregoing the Congress enacted, in Sec. 905 of the Revised Statutes:

> * * * "The records and judicial proceedings of the Courts of any State or Territory or of any such country, shall be proved or admitted in any other court within the United States by attestation of the clerk and the seal of the court annexed, if there be a seal, to-

gether with a certificate of the judge, chief justice or presiding magistrate that the said attestation is in due form. And the said records and judicial proceedings so authenticated shall have such faith and credit given to them in any court within the United States, as they have by law or usage in the courts of the State from which they are taken."

The foregoing is neither anaemic nor ambiguous. The Michigan record is duly authenticated according to the provisions of the Revised Statutes and is stipulated in evidence.*

* See Agreed Statement of Facts, Record page 18, and John H. Olmsted's Exhibit, Record page 42 *et seq.*

There is no attempt being here made to galvinize into vitality a long neglected and dishonored provision of our fundamental law, nor do we seek to clothe the provisions quoted with any new and mysterious power. This court since its inception has clearly resolved all questions arising thereunder in favor of the clause where the original court had jurisdiction and the judgment recovered was valid *where rendered*, except in the sole case of divorce actions. By a form of judicial legislation not readily apprehended by the ordinary mind, this court has come to the conclusion that divorces, which upon all grounds of morality and expediency should be the subject of uniform tests and rulings, must be relegated to the twilight zone between actions *in personam* and actions *in rem*, and emerge therefrom either entitled to the protection of the Constitution or not, according to whether the matrimonial domicile has or has not been confided to the state wherein the divorce was granted.

Stated in lowest terms, this Court has decided as follows:

A divorce recovered in a given state by a person domiciled in that state and based upon constructive service, is valid in that state.

It is not precisely an action *in personam*.

It is not exactly an action *in rem*. If it were the former, it would not be valid where rendered, if the latter it would; likewise, elsewhere. Therefore although valid where rendered, and by the Constitution and Revised Statutes to be given the same faith and credit in any Court as where recovered, these

provisions do not mean what they say and no Court in any state can be compelled to respect such a decree.

See *Haddock v. Haddock*, 201 U. S., 562.

It may be permitted to ask, how can a judgment be valid where rendered and fail to fall within the protection of the Constitution? It would seem that the above case either went too far in declaring the Connecticut divorce valid in that state, or not far enough in deciding that it was not entitled to full faith and credit elsewhere.

This issue is avoided by the following language taken from the opinion, and the quotation indicates the probable reason for the decision.

> "In other words, any person who was married in one State and who wished to violate the marital obligations would be able, by following the lines of least resistance, to go into the State whose laws were the most lax and there avail of them for the purpose of the severance of the marriage tie and the destruction of the rights of the other party to the marriage contract, to the overthrow of the laws and the public policy of the other States."

See *Haddock v. Haddock, supra*, at p. 574.

Such must have been the reason for finding that the judgment of the Connecticut Court valid where rendered, meant nothing elsewhere, the Constitution to the contrary notwithstanding. The other horn of the dilemma being that the judgment was invalid where rendered, or that no state possesses the power of adjudicating the matrimonial status of its domiciled citizen in the physical absence of the other spouse, the statement of which conclusion carries its own refutation. It is a familiar principle that where the reason for a rule fails, the rule fails. Therefore the absence in this case of the reason for the decision in *Haddock v. Haddock*, indicates the failure of the rule therein announced. Whether *Haddock v. Haddock* is at variance with *Atherton v. Atherton*, 181 U. S., 155, may be left to other discussions. Certain it is that no question of the matrimonial rights of the first Mrs. Olmsted, or the matrimonial obligations of the man she married in New York, is here involved.

The judgment under review does not add anything to the sanctity of the first marriage. It contributes nothing to what has been recognized as the law since 1906, in respect to the right of the New York Courts to disregard the Michigan decree *at the behest of the first Mrs. Olmsted.* Nor does it operate to confirm the legitimacy of the children of the first marriage, for they could in no wise be deprived of that status. Benjamin F. Olmsted is dead, as are his wives. He lived with the second until his death and the first received alimony from him from April 15, 1885, until her death in 1902.

See Requests and Refusals to Find, Finding XIX, Record page 30.

The question here presented is simply this: In this action, between the children of the first marriage and those of the second, in which the sole consideration is whether the latter are "lawful issue" or not, are the second children entitled to the protection of the Constitution for the purpose of preserving in New York the status of legitimacy created for them in Michigan?

The fact should be borne in mind that the legitimacy of the first children is in no manner at stake, their only interest in contesting the litigation is to accomplish a division of $4,000,000 into four rather than six parts—that of the plaintiffs in error is to enjoy a position in the community, the value of which is not to be calculated in any known medium of exchange.

It is believed that even if sound public policy dictated the decision in *Haddock v. Haddock* thereby creating an exception to the rule laid down in the Constitution and Revised Statutes, that a sounder public policy requires that this case should be decided according to the rule and not according to the exception.

That the framers of the Constitution recognized the necessity for a clear, certain and firm provision of this kind is to be adduced from a comparison of Art. IV., Sec. 3 of the Articles of Confederation, with the provision as it now exists. In enforcing that portion of the Constitution in

Hampton v. McConnel, 3 Wheat. 234.

Mr. Chief Justice Marshall said:

> "the judgment of a State Court should have the same credit validity, and effect in every other court in the United States, which it had in the State where it was pronounced, and that whatever pleas would be good to a suit thereon in such State, and none others, could be pleaded in any other Court in the United States."

The plaintiffs-in-error believe that the decision herein can be rendered in their favor without doing violence to the decision in *Haddock v. Haddock*, because of the manifest difference in the questions presented for adjudication and will presently demonstrate that position. If the Court is of a contrary opinion, we submit that there is no time like the present to undo the harmful incidents of that decision by frankly abandoning it.

The distinction in principle is that an outraged spouse can always find refuge in *Haddock v. Haddock* as indicating a state of facts creating an exception to the full faith and credit clause, while innocent children of succeeding marriages, who obviously had nothing to do with their parents' proceeding along the line of least matrimonial resistance, can successfully urge that no questions of marital right or obligation being involved, they are entitled to the full protection of the Federal compact.

To concretely illustrate what a denial of that claim would amount to under the law as it is presently interpreted: This Court would be called upon to say to the plaintiffs-in-error: "If your father's first marriage had been performed in Michigan, and the parties thereto had resided there for a few days, and then had removed to New York, and all the other facts had occurred as set forth in this record, then under *Atherton v. Atherton* your reliance upon the Federal Constitution would have been incontestible and you would be entitled to judgment, but the first marriage having been in New York, we are constrained under *Haddock v. Haddock* to avoid the apparent force of your argument that you are claiming by virtue of the second marriage which was valid in Michigan, and we cannot help the fact that the first marriage is no concern of yours and we must exact the penalty of bastardizing you

for your father's indiscretion in having first been married in New York instead of Michigan."

In all deference it is submitted that the foregoing would come perilously near to justifying a paraphrase upon an immortal comment, which could then be rendered thus:

> "What is a little thing like the Constitution between logicians?"

The following judicial utterances justify the assertion that the standing of children is an independent consideration not to be confused with that of their parents. To state it otherwise, a marriage valid where rendered confers a right upon the offspring of that alliance, which, in civilized society, is not to be afterward limited and denatured in connection with a similar treatment accorded to their parents' status in obedience to the protests of the community or an injured individual.

> *"We are of opinion that the conflict in the law of divorce between the different States and Territories has gone to the extreme limit and that the status of the parents as husband and wife in one State and as divorced in another should not be visited upon the innocent offspring of the succeeding marriages."*
>
> See Opinion of Appellate Division of New York Supreme Court, in this case, Record page 62.
>
> See also *Matter of Hall*, 61 App. Div., (N. Y.), 266.

In this case the Court was considering the right of a child to take a distributive share of personal estate, his parents having married in Dakota where he was born, and where his mother had recovered a divorce from her first husband pursuant to service of process by publication.

> "If, as has been recognized by our courts, the decree of divorce in Dakota was effective to establish the status of Alice Maude in Dakota, *the child was there legitimate, and if, as has been shown, the legitimacy of this child at the time and place of its birth made it legitimate everywhere, the right to succession is established.* Nor can there be any ground of public policy which would preclude our recognizing the legitimacy of this child in Dakota. In the first place, under our own statutes, a decree of divorce may be ob-

> tained in this State by a resident against a non-resident by the service of the summons by publication. The status then that is acknowledged to Alice Maude in Dakota after the divorce is the same status which would be accorded to her in our State, were the divorce granted by our court. *But, more than that, to whatever extent public policy may lead the courts of this State to question in this State the relation of Alice Maude to Richmond Kingman, the father of the infant, that public policy has never led the courts of our State to a denial of the status of legitimacy to the issue of that marriage when legitimate where born.* In this the humanity of our laws which will protect the innocent from the wrongs of others outweighs any possible claim of public policy to the contrary, *and for the protection of this child the court should not hesitate to apply the general rule that his legitimacy in Dakota determined his legitimacy here. Whatever, therefore, may be the status of Alice Maude Fithian under our laws, the legitimacy of her son would seem undoubted.* As the legitimate son he is next of kin to Ella Maria Fithian, named in the will." (Italics ours.)
>
> See also *Inhabitants etc. v. Lexington* (1823), 18 Mass., 506.

In distinguishing between the attitude of the Court toward a father who had committed a bigamous marriage, according to Massachusetts law, and the children thereof the Court says:

> "*But the case before us is not of that nature, for the guilty husband does not come here to live under the protection of our laws in open defiance of their authority; it is his descendants only upon whom the present question can operate, and it would be a hard measure toward them to deny them the privileges and character of legitimate children, when, under the laws of the State where they were born, they would be recognized as such* * * *. If Samuel Bemis had come into this State to claim in our courts an enforcement of any of his marital rights, it would be competent to the courts here to refuse him upon the ground that the marriage upon which he founded his claim was contracted in violation of the laws of this State, and that it was contrary to good policy, as well as detrimental to the public manners, that he should be allowed to enforce such claim; and *yet, if his children of the second*

marriage, after his death, should come here to claim an inheritance from their father, the same strictness is not necessarily to be applied, as the same reason would not, to the same extent, exist.

It was not intended, nor was it in the power of the legislature to prevent Samuel Bemis from removing into another State and enjoying there all the privileges of a citizen. Having a right by law to marry there, he could not while there violate the statutes against polygamy. His children, therefore, are legitimate there, and they ought not, unless by virtue of some express legislative act, to be deemed illegitimate here. The disability was only local, limited by the confines of the State which enacted it.

Upon the whole, as the marriage in New Hampshire was lawful there, and to give it effect here for the purpose of this action is not derogatory to the dignity or our own laws, we do not see sufficient reason for questioning the legitimacy of the paupers; so their settlement must be held to be in Lexington, where that of Samuel Bemis was." (Italics ours.)

It is familiar law that the legislatures of several states have enacted statutes to the effect that when a void marriage is annuled, the children thereof are nevertheless legitimate.

These considerations therefore indicate that the Court may well apply one rule to husband and wife, and another to children.

It is true that the foregoing contention was overruled by the Court of Appeals of the State of New York. The reason is not far to seek. In some unaccountable manner that learned court in its opinion, went completely astray on the fundamental fact in this case, *i. e. that the Michigan marriage was valid in Michigan.*

The opinion continually likens the latter to a polygamous or incestuous marriage. In commenting on that fact the New York Law Journal in reviewing the opinion aptly says:

New York Law Journal, Jan. 22, 1908.

"With all due respect, it seems to us that this language utterly befogs the turning point of the case. It applies the test of New York law to the validity of the Michigan divorce and remarriage and the operation of the Michigan statute. The Court of Appeals lost sight

> of the fact that all the proceedings and the creation of status were *valid* in Michigan and that all the New York courts were called upon to determine was whether they would give full faith and credit in New York, to the Michigan decree and statute."

The Court quotes *Adams v. Adams*, 154 Mass., 290, as being "in many respects similar to this," although it appears from the statement of that case as quoted, that the husband who went to California to procure a divorce, never complied with the California statutes as to residence, and therefore his divoice was *not valid where rendered*.

One might with equal wisdom observe "counterfeit money is similar in many respects to legal tender."

The full measure of the inadvertence complained of is indicated by the statement in the opinion that Benjamin Olmsted procured in Michigan a decree "annulling" the New York Marriage (Record p. 82, fol. 142). The exemplified record of the Michigan proceedings will be scrutinized in vain for any evidence of an attempt to procure an annullment of the prior marriage.

Without intending any disrespect, it is permitted to observe that the opinion herein clearly indicates the extreme lengths to which the New York Courts will go to deny the right of the Courts of sister states to do exactly and precisely what is done every day in the year in New York, that is, to render a valid divorce in favor of a domiciled citizen based upon constructive service of process without regard to the fact in this case, that all parties to the successive marriages are dead, and that no post-mortem sanctity can attach to the marital rights of the first Mrs. Olmsted.

The decision herein is not sound in principle and is a tacit denial to these children, whose status was created by a sovreignty of equal magnitude to that of New York, of as important a right as was ever guaranteed by the constitution.

The general proposition, that legitimacy, one created will be everywhere recognized is discussed and applied in the following leading cases:

> *Miller v. Miller*, 91 N. Y., 315.
> *Van Voorhees v. Brintnall*, 86 N. Y., 18.

Bates v. Virolet, 33 App. Div. (N. Y.), 436.
Ross v. Ross, 129 Mass., 243.
Irving v. Ford, 183 Mass., 448.
Grey v. Stamford (1892), 61 Law J. Rep., New Series, Part I, page 622.
In re Goodman's Trusts (1881), Law Rep., 17 Chan Div., 266.
Contra
Smith v. Derr, 34 Penn. State, 126.
Shaw v. Gould, 3 H. L., 55.

The former of the last two cases is based on a local statute then in force in Pennsylvania, but since repealed, which was practically a reproduction of the English statute of Merton which controlled the decisions of *Birtwhistle v. Vardill*, 7 Cl. F., 895, and *Shaw v. Gould, supra.*

The so-called statute of Merton, which was in reality not a statute at all, was adopted for the protection of the English crown with particular reference to the possessions thereof in what is now French territory. It had to do solely with the descent of real property, in the event of intestacy, a pertinent fact which must not be lost sight of in considering the case of *Shaw v. Gould, supra.*

In re Goodman's Trusts, supra, commenting on Doe v. Vardill, Colton, L. J., says:

> "As the eldest son was admittedly legitimate by the law of Scotland, by which the succession to the father's personal estate must be governed, this contention (that the opinion referred solely to status in Scotland) would reduce to a nullity the opinion expressed by the judges, and in my opinion they did intend to express their opinion that the claimant being legitimate by the laws of Scotland, where his parents were domiciled at his birth and at the date of their marriage, must be considered as legitimate in England, except for the purpose of succession to real estate, and that this depended on a special rule of the feudal law as adopted in England. This, in my opinion was the view taken by Lord Cransworth in *Shaw v. Gould*, which has been already quoted in a different sense."

In this case the claimant was legitimate under the laws of Holland where her parents had intermarried after her birth,

but illegitimate under the laws of England. She was awarded by this decision a distributive share in the personalty of her deceased aunt, a sister of her father, upon the theory that the status of legitimacy conferred upon her in Holland, would be recognized in England.

Two further considerations present themselves in connection with the decision of *Shaw v. Gould*.

The divorce recovered by the wife in Scotland, which permitted her to there contract the second marriage of which the children were born who claimed the estate in England, was based upon an actual trial in Scotland in which the first husband appeared and defended; under like circumstances in this country the divorce would have been conclusive everywhere.

Haddock v. Haddock, 201 U. S., 562, at 570.
Cheever v. Wilson, 9 Wall., 108.

Further, it does not appear that the courts of England are specially enjoined to give full faith and credit to the decrees of the Courts of Scotland, except under the more or less elusive principles of international comity, while the fundamental law of this country provides for that very thing in the clause of the Constitution now under consideration.

Regard must be had in interpreting this portion of the Federal compact, to the conditions which existed in 1789 and the probable purpose which the framers had in mind, so far as the same can be discerned.

It is safe to assert that something more was intended than the concrete statement of the elastic principles of general comity, the which were variously interpreted and applied by the governments of Europe in 1789. The same uncertainty, existed in the American Colonies and to remove this, Sec. 3 of Art. IV of the Articles of Confederation, was adopted. This clause was unsatisfactory in that it failed to declare what effect the public acts and judicial proceedings of one state should have in another. So when the Constitution was adopted the defect was remedied and Congress was given the power to legislate in this respect. Section 905 of the Revised Statutes was then enacted and it is now too late to defeat the manifest purpose of the framers of our fundamental law, eith-

er by seeking to deprive these words of their clear and unmistakable meaning, or by so limiting their effect as to encourage the very evils sought to be eliminated.

The reasons for the adoption of the full faith and credit clause are set forth in

M'Elmoyle v. Cohen, 13 Pet., 312.

This Court has recently expounded the provision in question to apply to a judgment of a Missouri Court in an action between citizens of Mississippi, which judgment could not have been recovered in the latter state, because the cause of action would not have there existed.

See *Fauntleroy v. Lum*, 210 U. S., 230.

This result would seem to be entirely justified, if the language of the Constitution is to be interpreted in the light of the ordinary and accepted meaning of words.

The case of *Grey v. Stamford* (1892), 61 Law J. Rep. Chan. Div. N. S. Part I, 622, should be examined as throwing light upon the attitude of the English Courts, on this subject, if their views are deemed to be material to an issue presented under our Constitution.

The will in question devised the remainder after a life estate in real property, to "the children" of the testator's son Harry. The latter had acquired a domicile in the Cape of Good Hope, where he had a child by the woman who subsequently became his wife; there were also children born after the marriage. By local law the first child became legitimate on the marriage of his parents. This case was brought to determine whether the status of legitimacy, created in South Africa, should be given effect so as to enable that child to inherit this real property situated in England.

The Court decided that such *ante nati* was entitled to share in the inheritance under the will, and that the case of *Birtwhistle v. Vardill* (*supra*), controlled only the descent of real property, in the event of intestacy.

The opinion concludes as follows:

> "Now it seems to me, upon examination of *Doe D. Birtwhistle v. Vardill* that the rule there laid down re-

> lates only to the descent of land on an intestacy ar
> does not affect the case of a devise in a will to childre
> (*The court had previously said that 'children' mea*
> *'legitimate children.'*) In my opinion therefore, th
> son, John Grey, is entitled to share both in the gift
> real estate to Harry Grey, and also in the proceeds
> sale of the realty."

The case of *Miller v. Miller*, 91 N. Y., 315, is worthy
attention:

The plaintiff succeeded in an action in ejectment in refe
c[illegible]e to New York real estate, having been legitimated by th
marriage of his parents after his birth, in Pennsylvani
Under New York law he was illegitimate and prohibited h
statute from taking this real estate on his father's death i
testate, the title having vested under the New York statutes, i
the defendants, his father's collateral relatives.

Thus the New York Courts gave effect to a status create
in Pennsylvania, contrary to New York law, and took the re
estate out of the hands of those in whom it vested by loc
statute, and this conclusion was reached solely on the groun
that the status of legitimacy having been created in Pennsy
vania, continued to exist for all purposes in New York.

The case at bar, therefore, should follow the general pri
ciple of the recognition of status, unaffected by the anomalou
doctrine of *Haddock v. Haddock*, (*supra*) because that d
cision is in the nature of a rebuke to a method of escape fro
matrimonial obligations, and no such question is here involve

POINT IV.

THE JUDGMENT BELOW HAVING BEEN AGAINST THE CON
STITUTIONAL RIGHTS OF THE PLAINTIFF IN ERROR, MUST B
REVERSED.

A reading of the opinions found in this record indicates tha
the plaintiffs-in-error have been deprived of their constitutiona
rights to inherit this real estate as the "lawful issue" of thei
father, solely because two out of three New York Courts wer

of the opinion that under *Haddock v. Haddock, supra*, the children legitimated under the second marriage could not be heard to urge that the Michigan divorce and statute were entitled to full faith and credit in New York.

A contrary conclusion upon that point would have resulted in a judgment in favor of the plaintiffs-in-error.

The concluding paragraph of the opinion in the Court of Appeals by way of justifying the decision anyhow, may be deemed worthy of attention by this Court, and for the enlightenment of the latter, the following observations are offered.

The first clause in that paragraph is:

> "Should we sanction the doctrine contended for, then the legislature in any State could, in effect, nullify our own statutes and deprive our own citizens of property, which under our laws they had become vested with and entitled to receive."

Let us consider just what the citizens of New York, that is, the children of the first marriage, had become "vested with" under this will:

The material portion of the devise is as follows:

> "From and after the expiration of the said five years I give, devise and bequeath the said house, lot and premises to my said sons William E. and Benjamin Franklin for and during the natural lifetime of both my said sons and for and during the natural life time of the survivor of them, I give and devise the same to such survivor and the lawful issue of such of my said sons as shall be deceased, such issues to take and be entitled in equal shares and share and share alike; from and after the death of both of my said sons William F. and Benjamin Franklin, I give and devise one equal undivided, one-half part of the said house, lot and premises to the lawful issue of each of my said sons, such issue to take share and share alike, the children of any deceased, child of either of my said sons to take the share their parent would have taken if living."

Record Page 16, fol. 27.

Thus a devise is made to a class of persons, who were to take possession at the termination of the life of the survivor

of the two sons of the testator. The time of distribution is stated to be "from and after the death of both of my said sons." All of the claimants were born during the lifetime of Benjamin Olmsted, for his first and second wives died before he did.

Therefore while the children of Benjamin, living at the death of the testator (which means all of the children of the first marriage) were presumptively entitled to the estate in question on the death of the second life-tenant, they were only members of a class, the composition of which could not be determined until the period of distribution, for during that interval, the class was subject to decrease by death, or increase by birth.

Hence all persons answering the description of "lawful issue" *at the death of the second life tenant, then had a vested interest which could be measured as between them.*

In 2 Jarman on Wills (6th Am. ed.), 168, it is said:

> "Where a particular estate or interest is carved out with a gift over to the children of the person taking that interest, or the children of any other person, such gift will embrace not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution. Thus in the case of a devise or bequest to A for life * * * and after his decease to the children of B, the children, if any, of B living at the death of the testator, together with those who happen to be born during the life of A, the tenant for life, are entitled, but not those who may come into existence after the death of A."

In *Matter of Baer*, 147 N. Y., 348, it is said:

> "Where final division and distribution is to be made among a class, the benefits of the will must be confined to those persons who come within the appropriate category at the date when the distribution or division is directed to be made."

In *Gilliam v. Guaranty Trust Co.*, 186 N. Y., 127, it is said:

> "The general rule * * * is well established that when property at a future date is to pass to a certain class of persons, it will be distributed amongst the persons who compose such class at the date of distribution."

In *Bisson v. W. S. R. R. Co.*, 143 N. Y., 125, it is said by Mr. Justice Gray:

> "Though the heirs of the testator were determinable at his death, yet the gift to them was not, by the terms of the will, to vest in possession until after the determination of the life estate given to the widow. That was the time fixed for the gift to take effect and then was the time when the persons would be ascertained, who, coming under the description of heirs of the testator (in this case 'lawful issue of each of my said sons'), would be entitled to share with his widow in the distribution of the estate. Within that time the number of his heirs might be diminished by death or *increased by birth.*" (Italics ours.)

In the above case the time fixed was "from and after the death or re-marriage" of the life tenant.

It serves only to confuse the issue, to argue that a recognition of the constitutional rights of the plaintiffs-in-error in New York, will operate to permit the legislature of Michigan to disturb vested property rights established by the former state.

The recognition of the status of legitimacy in New York is quite foreign to any question of expediency under this will.

If these plaintiffs-in-error are entitled to a recognition of their status in New York, by virtue of the rights guaranteed to them by the Federal Constitution, then their claims to a share in this inheritance are exactly the same as if they had been children of the first Mrs. Olmsted, born after the death of the testator.

We have seen from the foregoing authorities that such children as came into being before the period of distribution were comprehended by the terms of the devise.

Recurring for the moment to the first portion of the clause quoted from the opinion of the Court of Appeals to the effect that the doctrine contended for would result in the legislature of any State having the power to nullify New York Statutes, reference should again be had to case of

Miller v. Miller, 91 N. Y., 315.

The decision in that case deliberately gave extra territorial effect to a Pennsylvania Statute of legitimacy so as to permit

the person benefiting thereby, to take the title of New York real estate away from the persons in whom it vested by local statutes of descent, although by the same statute, the plaintiff was disqualified from inheriting, being illegitimate according to New York law.

Hence we urge that the New York courts as long ago as 1883, recognized the obligations imposed by the Constitution of the United States, and gave full faith and credit to a Pennsylvania Statute of this very character, and are therefore in all conscience, committed to the doctrine contended for.

Again, had the Michigan divorce in this case been fortified by the supposedly important matrimonial domicile in Michigan, the case would have been "on all fours" with *Atherton v. Atherton*, 181 U. S., 155, so far as the divorce is involved and the same respect for that decision which is evidenced for *Haddock v. Haddock*, 201 U. S., 562, would have required the New York Courts to have decided this case in favor of the children of the second marriage, and we apprehend that no heed would have been given to the catastrophe said to have been averted, according to the language quoted.

To conclude the paragraph quoted from the opinion of the Court of Appeals:

> "Not only this, but the statute of Michigan, passed in 1881, could change the provisions of a will executed here and probated in 1874, bringing in persons as remaindermen, who, under the provisions of the will, were not remaindermen, nor entitled to a share in the estate."

The fallacy of the foregoing reasoning is plainly apparent upon brief reflection.

The will itself is responsible for the condition which existed in 1905, when the second life-tenant died, and which condition gave rise to this litigation. The testamentary instrument says in so many words that "from after the death of" both of said life-tenants, the persons who are then the lawful issue, shall have an estate vested in possession.

The members of the class could not be determined until the period of distribution. Those who *then* answered the description took title, and while it is true the will was probated

in 1874, by its terms it projected its ultimate effect for the period of two lives, and the testator must be taken to have contemplated exactly what happened, *i. e.*, that the life-tenants would have children born after the testator's death.

Therefore the Michigan Statute of 1881, is *not changing* the provisions of a will probated in 1874, because no one could tell what the will meant until 1905, when the surviving life-tenant died. The Michigan Statute of 1881, is merely one of the elements which must be considered in presently determining what ultimate effect must be given to the will probated thirty-five years ago.

Of course the court begs the entire question by saying that the plaintiffs-in-error were "not remaindermen nor entitled to share in the estate." If they were "lawful issue" of Benjamin Olmsted when he died, they are embraced within the terms of the will, if any children born to either life-tenant after the death of the testator and before the period of distribution, would be so affected.

Manifestly if the New York Courts could have decided this case on the ground that no children who came into being after the death of Silas Olmsted the testator, were entitled to inherit, they would have done so—that issue has never been litigated in New York between those parties.

It is therefore clear that to argue that the New York Courts were under no constitutional duty to these plaintiffs in error because they were born after the death of the testator, is unsound by reason of the language of the will, and in no event can fortify the refusal to recognize the personal status properly acquired under the laws of Michigan.

The entire reasoning of the paragraph quoted from the opinion below discloses a complete *non sequitur*.

The confusion is doubtless to be ascribed to the desire of the court to inject the doctrine of *Haddock v. Haddock* into a case which does not present the same issues, for fear that a failure so to do might perchance be construed into a tacit acknowledgment that the inflexible attitude of the New York Courts on the divorce question, might be open to logical criticism.

In commenting upon the opinion at Special Term in this case, the *Harvard Law Review*, March, 1907, says: "as the first fruits of *Haddock v. Haddock*, this case is not reassuring."

We therefore urge that neither due regard for the settled policy of the New York cases on this branch of the divorce law, nor proper construction of the will in question, justify the judgment now under review, solely because of the denial of the rights guaranteed to these plaintiffs-in-error by the Federal Constitution.

One further inconsistency on the part of the New York Court in determining this cause remains to be noted—in the opinion of the Court of Appeals

Record page 82,

reference is made to the action brought in New York by the first Mrs. Olmsted against her husband, in 1883, for a separation. The record of that proceeding is in evidence

Record page 30 *et seq.*

Judgment was recovered by the plaintiff in 1885. It will be noted that it does not appear that Benjamin Olmsted was served with process in *any* manner, nor that an answer was interposed on his behalf. He was however, represented on an appeal from a sequestration order, entered *after the judgment was recovered by the plaintiff in that action.*

We do not see how that judgment can affect the duty of the New York Courts to recognize the status created in Michigan in 1882, because it does not appear that process was even served and because the plaintiffs-in-error were not parties to the proceedings, and in any event cannot be properly held to be affected thereby for the reasons heretofore urged to show that the doctrine of *Haddock v. Haddock* has no application to them.

Moreover, this Court cannot fail to be impressed at the elaborate reverence with which the courts below regards an *ex parte* separation decree rendered in New York against a citizen of Michigan, as contrasted with the righteous indignation and outraged sensibilities with which they contemplate

the divorce granted by a Michigan court against a resident of New York.

The writ should be sustained, and the judgment should be remanded to the New York Supreme Court, with directions to enter judgment in favor of the plaintiffs-in-error, with costs in all courts.

Respectfully submitted,

MORTIMER W. BYERS,
Attorney for Plaintiffs-in-Error.

FILED.
JAN 24 1910
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

October Term, 1909

102

JOHN H. OLMSTED and WILLIAM F. OLMSTED,
Plaintiffs in Error,

vs.

DANIEL H. OLMSTED, ELLEN A. OLMSTED, MARY O. DECKER, *et el.*,
Defendants in Error.

Brief for Defendant in Error, Mary O. Decker, *et al.*

READ G. DILWORTH,
Of Counsel for Defendants in Error, Mary O. Decker, et al.

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N. Y. Office, Charles Watson Russell,
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1909

Argued by
Read G. Dilworth.

The Supreme Court of the United States

HN H. OLMSTED and WILLIAM H. OLMSTED,
Plaintiffs-in-Error,
against
NIEL H. OLMSTED, ELLEN O. OLMSTED,
MARY O. DECKER, *et al.*
Defendants-in-Error.

Statement of Facts.

This cause was originally submitted and tried on a statement of ced facts.

Silas Olmsted, a resident of the State of New York, died in the te of New York in 1874 (25), and by his will, probated in the te of New York, devised a life interest in one-half of a certain cel of real estate, located in the State of New York, to his son, jamin F. Olmsted, with remainder over to the *lawful issue* of said son (27). Benjamin F. Olmsted, while a resident of the te of New York, in 1850, married Mary Jane Olmsted in the e of New York (28), and lived with her in that State until Janu- 1870, when he deserted and abandoned her (28, 44). Daniel Olmsted, Mary O. Decker, Clarence E. Olmsted and Frank S. sted were the only issue of said marriage (28). On February 1874, Benjamin F. Olmsted, without procuring a divorce from wife, Mary Jane Olmsted, performed a marriage ceremony in Jersey with one Sarah Louise Welchman (28). Two children, n H. and William H. Olmsted, the plaintiffs in error, both born he State of New Jersey, were the issue of this attempted mar- with Sarah Louise Welchman (28). Thereafter, in 1880, Ben- n F. Olmsted and Sarah Louise Welchman with their two chil-

dren, went to the State of Michigan (28) and in 1882, Benjamin F. Olmsted procured a decree of divorce from his wife, Mary Jane Olmsted, in the Circuit Court of Wayne County, State of Michigan, alleging desertion and cruelty (28), the Michigan Court claiming jurisdiction by publication of process in a Detroit newspaper (28). Mary Jane Olmsted did not appear in said action, judgment being granted by default (29, 73-85). Thereafter, on August 22, 1882, Benjamin F. Olmsted and Sarah Louise Welchman performed another marriage ceremony in the State of Michigan (29). By the provision of a Statute enacted in the State of Michigan in 1881, subsequent to the death of Silas Olmsted, and the probation of his will in New York, children born out of wedlock become legitimate provided their parents subsequently intermarry (30). Thereafter, in January, 1883, in an action in the Supreme Court in the State of New York, a decree of separation was granted to Mary Jane Olmsted from her husband Benjamin F. Olmsted (29, 37, 53-72). Sarah Louise Welchman died January 30, 1960 (30), Mary Jane Olmsted died January 22, 1902 (30), and Benjamin F. Olmsted died July 16, 1905 (30). Mary Jane Olmsted was never in the State of Michigan and remained a resident of the State of New York continuously until her death (30). The plaintiffs in error, John H. and William H. Olmsted, children of Benjamin F. Olmsted by Sarah Louise Welchman, claim to participate equally with the children of Benjamin F. Olmsted, and Mary Jane Olmsted as the *lawful issue* of Benjamin F. Olmsted, in the real estate located in the State of New York, devised under the will of Silas Olmsted to the lawful issue of Benjamin F. Olmsted. The Court of Appeals of the State of New York affirmed the judgment of the New York Supreme Court denying such claim and the question is brought to this Court on a Writ of Error, upon the theory that the State of New York has violated the provisions of the United States Constitution in failing to give full faith and credit to the Public Act of the State of Michigan, No. 55 of 1881, under which the claim of the Plaintiffs in error to legitimacy is based.

POINTS.

I.

The Circuit Court of Wayne County, Michigan, did not have jurisdiction of the subject-matter, and did not obtain jurisdiction of the defendant in the suit for divorce by Benjamin Olmsted against Mary Jane Olmsted. The Michigan decree of divorce is therefore void, and the State of New York is not bound to recognize its validity.

Benjamin Olmsted was married to Mary Jane Olmsted in the State of New York on December 25, 1850 (28-35), and lived with her in that State for twenty years, until 1870, when he deserted her. New York was therefore the matrimonial domicile. Mary Jane Olmsted lived in, and was a citizen of New York until her death, was never in the State of Michigan (28), and did not voluntarily appear in such suit, service of process being had by publication in a Michigan newspaper (29). The Michigan decree of divorce was therefore of no effect, and the State of New York properly rejected it.

Olmsted v. Olmsted, 190 N. Y., 458.

Mr. Justice Haight in writing the opinion of the Court of Appeals (N. Y.):

> "While the courts of this state are required to give full "faith and credit to the decrees of the courts of our sister "states, we have the right to inquire as to whether such courts "had obtained jurisdiction of the person and the subject-mat- "ter; and if we find that they had not obtained jurisdiction, "then their judgment or decrees become of no force and ef- "fect."

Olmsted vs. Olmster, *supra* (142).

Matter of Kimball, 155 N. Y., 68.
Winston vs. Winston, 165 N. Y., 555.
Atherton vs. Atherton, 155 N. Y., 129, 181 U. S., 38.
Haddock vs. Haddock, 201 U. S., 562.

In Haddock vs. Haddock the marriage took place in the State of New York. The husband deserted the wife, went into the State of Connecticut and there obtained a divorce, service of process being made by publication in a Connecticut newspaper.

Mr. Justice White rendering the decision of this Court, says:

> "And further we hold that the decree of the Court of Con- "necticut, rendered under the circumstances, stated, was not

"entitled to obligatory enforcement in the State of New Yor
"by virtues of the full faith and credit clause."

The divorce being void in New York the attempted subsequen marriage with Sarah Louise Welchman in the State of Michigan also void. To decide otherwise is to place the State of New Yor in the absurd and repugnant position of recognizing two law ful wives of one husband at the same time, the New York Court hav ing by decree recognized Mary Jane Olmsted to be the lawful wif of Benjamin Olmsted in the separation suit, subsequent to the Michi gan decree of divorce and attempted marriage (29, 30). Th Michigan divorce and marriage both being void in the State of Nev York, the Michigan Statute, by which it is attempted to legitimatiz the two children of that marriage does not apply. It can have n more effect than the marriage upon which such claim to legitimac is based. The said children were never in a position to be reache by such statute.

Story Conflict of Laws, 113, 114.

The contention, that although the Michigan decree may be invali and of no effect, still the illegitimate children became legitimate un der that decree, and therefore the New York Court is bound to recog nize them, is properly disposed of in the decision of the Court o Appeals (N. Y.), in Olmsted vs. Olmsted, *supra* (142).

"Should we sanction the doctrine contended for, then the
"Legislature in any state could, in effect, nullify our own stat-
"utes and deprive our own citizens of property, which under
"our laws they had become lawfully vested with and entitled
"to receive. Not only this, but the Statute of Michigan, passed
"in 1881, could change the provisions of a will executed here
"(N. Y.) and probated in 1874, bringing in persons as re-
"maindermen who, under the provision of the will, were not
"remaindermen nor entitled to share in the estate. We think
"this should not be permitted."

The attempted marriage in Michigan with Sarah Louise Welch- man occurred August 22, 1882 (29). Sarah Louise Welchman died January 30, 1900 (30), during the lifetime of Mary Jane Olmsted, who died January 22, 1902 (30), the recognized legal wife in the State of New York of Benjamin Olmsted (29, 30), so that at no time was it possible for the Michigan Statute to take effect so as to legitimatize the issue of the said marriage.

II.

No Federal question whatever, is involved in this case. The sole question at issue is the determination of the *lawful issue* of Benjamin Olmsted, designated as such in a devise of an interest in real estate, located in the State of New York, under the last will of Benjamin Olmsted, who died in the State of New York, a resident thereof, and which was probated in the State of New York, and should be controlled and governed by the laws of the State of New York and not those of Michigan. Each state has the exclusive right to determine the disposition and title to real estate located within its borders. The Statutes and decrees of the State of Michigan can have no extra territorial force so far as they might affect the title to or disposition of real estate located beyond its borders.

Van Clief vs. Burns, 133 N. Y., 540.
Story Conflict of Laws, 359-90.
Kents Commentaries, Vol. II, pp. 118, 140.
Robertson vs. Pickrell, 109 U. S., 608.

To permit the Michigan Statute to control in determining who are the *lawful issue* of Benjamin Olmsted, so as to divest interests in real estate located in New York, which have already become vested in favor of residents of the State of New York, would be a recognition of the right of the legislature of the State of Michigan to legislate with respect to the disposition of real estate located in the State of New York, and would lead to much confusion, and tend to upset land titles. No state would be secure in protecting the rights of its citizens to real property located within its own borders, against the invasion of the legislatures of other states.

Chap. 531, Laws of the State of New York, 1895, provide:

> Sec. 1. "All illegitimate children whose parents have here-"tofore intermarried, or shall hereafter intermarry shall there-"by become legitimatized and shall be considered legitimate "for all purposes. Such children shall enjoy all the rights and "privileges of legitimate children provided, however, that vest-"ed interests or estates shall not be divested or effected by this "act."

Chap. 272, Laws 1896, amended this act so as to make it read as follows:

> "An illegitimate child whose parents have heretofore inter-"married or shall hereafter intermarry, shall thereby become "legitimatized and shall be considered legitimate for all pur-

"poses entitled to all rights and privileges of a legitimate child; "but, an estate or interest vested before this marriage of the "parents of said child shall not be divested or affected by rea- "son of such child being legitimatized."

Under the law of New York, regardless of the effect, if any, the subsequent marriage of the parents may have had as to the legitimacy of the plaintiffs in error, the interests already vested in the issue of the New York marriage, under the will of Silas Olmsted, are not divested, and the claim of the plaintiffs in error to participate in a share of such estate must fail.

III.

Neither the Michigan Statute, under which the claim to legitimacy is based, nor the New York Statute, Chapter 531, Laws 1895, and amendatory acts, is retroactive, so as to divest interests in real estate, created and vested, prior to the enactment of either of such statues, in the issue of the marriage of Benjamin Olmsted with Mary Jane Olmsted in New York.

The Michigan Statute was adopted in 1881, and the New York Statute in 1895, both became laws after the death of Silas Olmsted, and the probation of his will, which occurred in 1874, under which the issue of the New York marriage, all of whom were in existence at the time of the attempted Michigan marriage, acquired vested interests (28). Regardless therefore, of the effect, if any, these statutes may have as to the legitimacy of the plaintiffs in error, they cannot be invoked for the purpose of divesting such interests, as had already been created and become vested in the lawful issue of Benjamin Olmsted.

Opinion Justice Haight in Olmsted vs. Olmsted (141):

> "Such a statute was adopted in Michigan in 1881, and in this "State in 1895. These statutes, however, were passed long "after the death of Silas Olmsted and the admitting of his will "to probate, under which his legitimate grandchildren became "vested as remaindermen in the estate left by him, subject to "the life use by their father."

If the Michigan statue enacted in 1881, in effect, divests and deprives the issue of the marriage of Benjamin Olmsted and Mary Jane Olmsted, of an interest in real estate vested in them in 1874, it is confiscation, and deprives them of property without due process of law. It is therefore unconstitutional, and in violation of the 5th amendment to the United States Constitution, as well as the Constitutions of both states.

Matter of Baringer, 29 Misc. (N. Y.), 462.
Westervelt vs. Gregg, 12 N. Y., 202, 209.
Ryder vs. Hulse, 24 N. Y., 372-373.
Story on Constitution, 1309, citing Fletcher vs. Peck, 6 Cranch, 67-134.

The laws of the State of New York in force at the death of Silas Olmsted in 1874 must control. At that time, the plaintiffs in error, if they were in existence at all, were beyond question illegitimate.

Marshall vs. King, 24 Miss., 85.
McGaughey vs. Heney, 15 B. Mon., 383.
Miller vs. Miller, 111 Mich., 393-401.

IV.

The suggestion that the "Humanity of our Law should protect the innocent from the wrongs of others," and should induce the court to grant to these children of the Michigan marriage the status of legitimacy, if it has any foundation in law at all, should not be extended so as to divest interests in real estate which have already become vested, and deprive the owner of such vested interests. Such a doctrine, if followed, would tend to upset real estate titles, and logically leads to the question put by Mr. Justice Greenbaum in the opinion rendered by him on the trial of this cause.

> "If our Humanity 'will protect the innocent from the "wrongs of others,' why are not all bastards deemed legiti-"mate. * * * * If such reasoning be sound, then would "the question of illegitimacy cease to vex the courts. If the "marriage institution is to be upheld in its integrity in obedi-"ence to the law and policy of this State, the unfortunate con-"sequences of innocent offspring cannot be avoided" (91).

Such a doctrine is repugnant to and inconsistent with the theory of Haddock vs. Haddock, and so long as that case is the law, the children of the Michigan marriage cannot claim legitimacy, so as to participate as *lawful issue* in real estate, located in New York.

V.

Where the decision of the State Court might have been based on other grounds then the Federal question raised, the Supreme Court will not reverse, even though of the opinion that the Federal question was erroneously decided.

Murdock vs. Memphis, 20 Wall., 590, 636.
Klinge vs. Mo., 13 Wall., 257.
Johnson vs. R., 137 U. S., 300, 307.
Eustice vs. Bolles, 150 U. S., 361, 320.
Mo. Pac. Ry. & Fitzgerald, 160 U. S., 556.
Seeberger vs. McCormick, 175 U. S., 274.
Harrison vs. Johnston, 142 U. S., 73.

The decision of the Court of Appeals, N. Y., might have
based, and can be sustained on the grounds set forth in either P
II, or Point III, neither of which would involve a federal questio

VI.

The writ of error should therefore be dismissed, and the judgm
of the New York Supreme Court affirmed.

Respectfully submitted

READ G. DILWORTH,
of Counsel for Defendants in Error,
Mary O. Decker, Clarence E. Olmsted, *et al.*

JAN 24 1910
JAMES H. McKENNEY,

Supreme Court of the United States

October Term, 1909

No. 102

JOHN H. OLMSTED and WILLIAM F. OLMSTED,
Plaintiffs in Error,

vs.

DANIEL H. OLMSTED, ELLEN A. OLMSTED, MARY O. DECKER, *et el.*,
Defendants in Error.

Brief for Defendant in Error, Daniel H. Olmsted

CHARLES H. LUSCOMB,
Of Counsel for Defendant in Error.

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1909

Supreme Court of the United States

OCTOBER TERM 1909.

Number 102.

JOHN H. OLMSTED and WILLIAM F. OLMSTED,
Plaintiffs in Error,

vs.

DANIEL H. OLMSTED, ELLEN A. OLMSTED, wife of Daniel H. Olmsted, MARY O. DECKER, *et al.*,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR, DANIEL H. OLMSTED.

STATEMENT.

This action was brought in the Supreme Court of the State of New York for the partition of certain real estate located in the City of New York, devised under the will of one Silas Olmsted, to his sons William F. and Benjamin Franklin Olmsted for life and from and after the death of both, "to the lawful issue of each of my said sons" (p. 16).

In 1874, Silas Olmsted, then seized of the premises in question, died and his Will was duly admitted to probate (p. 15).

Benjamin F. Olmsted survived his father and died in 1905. William F. Olmsted died long prior thereto (pp. 16-17).

In December, 1850, Benjamin married Mary Jane Olmsted, in the State of New York and they lived together in

that State until June, 1870, at which time he deserted and abandoned her (Complaint and Judgment, pp. 32-38).

The issue of this marriage are the defendants in erro Daniel H. Olmsted, Mary O. Decker, Clarence E. Olmste and Frank S. Olmsted.

The real estate, which is the subject of this litigation, veste in the defendants in error, all of whom were living, on th death of Silas Olmsted in 1874. This was before the birth o the plaintiffs in error, seven years before the enabling Michi gan Statute, which was passed in 1881 (p. 82) and eight year before the Michigan divorce and the Michigan marriage o Benjamin Olmsted and Sarah Louise Welchman.

On January 22nd, 1885, in an action in the Supreme Court New York County, for a separation, on the ground of aban donment, Mary Jane Olmsted, plaintiff, and Benjamin F. Olm sted and others, defendants, judgment was entered for th plaintiff, decreeing such separation (pp. 32-38), and by a order of said Court entered in the same action, April 15th 1885, all the property of said defendant Benjamin F. Olmste was sequestrated and placed in the hands of a receiver to pa the alimony and costs by said separation decree ordered to b paid (p. 41).

In this sequestration proceeding, said defendant Benjamin F. Olmsted, duly appeared by attorney, opposed the motion and upon appeal, the order was affirmed by the then Genera Term of the Supreme Court. This receivership and the exist ing condition continued until the death of the said Mary Jan Olmsted in 1902.

In 1874, about four years after his abandonment of hi wife, the said Benjamin F. Olmsted maintained meretricious relations with one Sarah Louise Welchman and by he had two children who are the plaintiffs in error John H and William H. Olmsted. He subsequently went to Michiga with said Sarah Louise Welchman and the two children an thereafter, in 1882, brought action in the Circuit Court Wayne County, Michigan, against his wife Mary Jane Olm sted, for a divorce, alleging extreme cruelty and desertion (p. 17).

Service was made by publication only, in a Detroit paper No attempt was made to secure personal service upon defend ant and none such was made, although the Michigan Record

described defendant's residence as in New York. She did not appear and on June 19th, 1882, judgment by default dissolving the marriage, was entered in the Michigan Court (p. 17).

Mary Jane Olmsted was never in Michigan and her domicile and the domicile of the said Benjamin F. Olmsted, until he abandoned his wife in New York, was the State of New York (p. 17).

The matrimonial domicile was in New York.

On August 22nd, 1882, Benjamin F. Olmsted performed a marriage ceremony in Michigan with Sarah Louise Welchman and lived with her until her death, January 30th, 1900 (p. 17).

The dates of the death of these several parties are as follows:

Sarah Louise Welchman, January 30th, 1900;

Mary Jane Olmsted, January 22nd, 1902;

Benjamin F. Olmsted, July 16th, 1905 (p. 18).

So that at the time of the death of Sarah Louise Welchman, Mary Jane Olmsted, the lawful wife, was living and the New York decree of separation was in full force and effect.

Plaintiffs in error claim that under the Michigan Statute they are clothed with legitimacy of such character as to entitle them to a distributive share in the New York real estate, which is the subject of this action, equally with the lawful issue and that the due faith and credit provision of the Constitution of the United States has been disregarded by the Court of Appeals in New York.

BRIEF.

FIRST: There is no Federal question. The due faith and credit clause of the Constitution is not involved and the writ of error should therefore be dismissed.

(1) The question at issue is wholly as to the title to New York real estate left under a New York will.

Each State has an independent right to determine the disposition of real estate within its own borders and the decisions of its Courts upon the construction and application of its own local Statutes, regulating real estate titles and real property holdings, is not a Federal question.

The Federal Courts will not intervene to construe a local Statute dealing with local property.

(2) Even on contention of legitimacy urged by plaintiffs in error, the provisions of Chap. 531 of the Laws of 1895 as amended by Chap. 272 of the Laws of 1896 and Chap. 725 of the Laws of 1899, now Chap. 19 of the Laws of 1909, Art. 3, Sec. 24 of the Domestic Relations Law, make the question wholly within the Statutes of New York, which clearly define the character and scope of legitimacy acquired by children born illegitimate and subsequently legitimatized by Statute, upon the marriage of their parents.

The Statutes are as follows:

Chap. 531, Laws of 1895.

"All illegitimate children whose parents have heretofore intermarried or shall hereafter intermarry, shall thereby become legitimatized and shall be considered legitimate for all purposes. Such children shall enjoy all the rights and privileges of legitimate children. *Provided, however, that vested interests or estates shall not be divested or affected by this act.*

Chap. 725, Laws of 1899, Vol. 1, p. 531, Cons. Laws of N. Y. (1909).

"An illegitimate child whose parents have heretofore intermarried, or shall hereafter intermarry, shall thereby become legitimatized and shall become legitimate for all purposes, entitled to all the rights and privileges of a legitimate child: *but an estate or an interest vested* or trust created, *before the marriage of the parents of such child, shall not be divested or affected by reason of such child being legitimatized.*"

The estate and interest vested in defendants in error in 1874. The Michigan Statute was passed in 1881. The marriage of the parents of the plaintiffs in error was in 1882.

The Michigan Statute is not and could not be retroactive and it does not therefore affect or control a title theretofore created and vested.

The New York Courts have therefore disposed of the issues presented in this action, under the New York Statutes in no particular contrary to the Constitution of the United States.

(3) Michigan never acquired jurisdiction either over the New York wife or the New York real estate, which is the sub-

ject-matter of this action, and in default of this, its judgments, decrees and statutes could have no extra territorial force or effect (p. 82).

Matter of Kimball, 155 N. Y., 68.
Winston v. Winston, 165 N. Y., 555.
Haddock v. Haddock, 201 U. S., 562
Atherton v. Atherton, 155 N. Y., 129, 181 U. S., 155.

The decision of this Court in Haddock v. Haddock (*supra*) absolutely defines the extent and limit of application of the due faith and credit provision and establishes that decrees of the same kind and nature as are relied upon by the plaintiffs in error, in the case at bar, are not required to be enforced by another State under the Constitution of the United States.

SECOND: The Will of Silas Olmsted devised the real estate in question, to the "lawful issue" of his sons (p. 16). This means and must be construed to be lawful issue according to the Laws of New York.

Plaintiffs in error are not and never became lawful issue under the Laws of New York.

Lawful issue cannot be predicated upon a void divorce followed by a void marriage.

The premises are faulty.

The childrens' title flows from the father.

That which he did not have he could not transmit nor could they acquire from any other direction or through any other source.

Olmsted could not have married their mother in New York State and thus given them legitimacy there, because the laws of that State forbid it.

How, therefore, could he secure it for them by procuring it in another State and bringing it here, claim that which inherently New York necessarily denied him.

He has not changed the metal by running it through another crucible.

The impossible foundation proposition faces him from whatever direction he may come.

Olmsted never was in a position to contract a marriage that would be valid in New York and his illegitimate children could acquire no better position than he had, nor could the legal obstacles in his way, by any legerdemain, disappear because of his death.

THIRD: The Laws of the State of New York, above quoted, Chap. 531 of the Laws of 1903 as amended by Chap. 272 of the Laws of 1896, Chap. 725 of the Laws of 1899 and now Chap. 19 of the Laws of 1909, declare the character of legitimacy in the case of children born illegitimate and subsequently legitimatized by the marriage of their parents.

So that, even were the Statute in Michigan retroactive and accepted in New York, it could only be to the extent permitted by the New York Statute and this would absolutely debar them from participation in the real estate involved in this action.

Due faith and credit does not mean that the fabric of the Laws of one State may be modified or destroyed by incompatible or antagonistic legislation in another.

If this were so, each State might indefinitely regulate, control and nullify the official acts of its neighbor within its neighbor's borders and limitless confusion and entanglement would be the result.

In the case at bar, to give the Michigan Statute force and effect in New York, would be an invasion of the Laws of New York.

FOURTH: The question is not whether the children legitimatized in Michigan carry this status elsewhere, but the extent, nature and quality of such Status if any, as they may have acquired under the Michigan Statute of 1881, so far as existing conditions in New York are concerned and permit.

Can they in the face of a divorce and marriage, both void in New York, take New York real estate left by a New York will, against New York's Statute and its construction against them by the New York Court and so oust the lawful New York issue from an estate vested in 1871 (p. 15), before they, the illegitimates, were born and before the Michigan Statutes were passed, in 1881 (p. 18).

They are not the only issue of Benjamin Olmsted. They enter the State of New York, claiming, under a foreign divorce and remarriage, which under Haddock v. Haddock, are absolutely void in New York and facing lawful issue of the same Benjamin Olmsted, in possession of a vested interest in real estate there located, attempt to divest the lawful heirs in defiance of the New York Statute.

This they cannot do.

Matter of Kimball, 155 N. Y., 68.

The fact that they are innocent of the wrongdoing of their ather does not confer upon them property rights that run only o those lawfully entitled under the New York law.

FIFTH: The final judgment in the separation action in he Supreme Court, entered January 22nd, 1885, Mary Jane Olmsted against Benjamin F. Olmsted *et al.* (pp. 38-41) is *s adjudicata* and conclusively fixes the status of both Benamin and Mary Jane Olmsted. This marriage remained in ull force until the death of Mary Jane Olmsted.

SIXTH: The Writ of Error should be dismissed and the ecision of the Court of Appeals of the State of New York ffirmed.

Dated, November 1909.

CHARLES H. TUSCOMB,
Of Counsel for Defendant in Error.